91-669

Supreme Court, U.S.
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Case No. _____

IN THE
Supreme Court of the United States
October Term, 1991

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

DAVID ALAN GORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether review should be granted to allow this Court to decide the standard to be applied in determining the harmlessness of any violation of *Lockett v. Ohio,* 438 U.S. 586 (1978), and *Hitchcock v. Dugger,* 481 U.S. 393 (1987), an issue which the circuit court below declined to address based upon its recognition that conflicting standards for harmless error had been applied by the circuit court in its prior decisions and any attempt to "wrestle" with the issue would only result in further conflict.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 7

REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF *LOCKETT v. OHIO,* 438 U.S. 586 (1978), AND *HITCHCOCK v. DUGGER,* 481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON ITS RECOGNITION THAT CONFLICTING STANDARDS FOR HARMLESS ERROR HAD BEEN APPLIED BY THE CIRCUIT COURT IN ITS PRIOR DECISIONS AND ANY ATTEMPT TO "WRESTLE" WITH THE ISSUE WOULD ONLY RESULT IN FURTHER CONFLICT

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	*Page(s)*
Booker v. Dugger, 922 F.2d 633	10
Chapman v. California, 386 U.S. 18 (1967)	15
Delap v. Dugger, 890 F.2d 285 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2628 (1990)	9, 10
Demps v. Dugger, 874 F.2d 1385	11
Gore v. State, 475 So.2d 1205 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986)	4
Gore v. Dugger, Gore v. State, 532 So.2d 1048 (Fla. 1988)	4
Gore v. Dugger, 763 F.Supp. 1110 (M.D. Fla. 1989)	5
Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991)	6
Hitchcock v. Dugger, 481 U.S. 393 (1987)	*passim*
Jackson v. Dugger, 931 F.2d	10
John Hancock Insurance Company v. Bartels, 308 U.S. 180 (1939)	13
Jones v. Dugger, 867 F.2d	10
Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988)	10, 11
Lockett v. Ohio, 438 U.S. 586 (1978)	*passim*
Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720, 111 S.Ct. ___ (1991)	14
Proffit v. Florida, 428 U.S. 242 (1976)	11
Richardson v. Thigpen, 883 F.2d 895 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 17 (1989)	12

Cases *Page(s)*

Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) . . . 11

Satterwhite v. Texas, 486 U.S. 249 (1988) 15

Skipper v. South Carolina, 476 U.S. 1 (1986) 15

Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989) . . . 9, 10

Walton v. Arizona, 497 U.S. ____, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) 14

Other Authorities

28 U.S.C. § 1254(1) 2

§ 921.141(2), Fla.Stat. (1977) 11

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v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, rendered on May 29, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 933 F.2d 904 (11th Cir. 1991), and is reproduced in the Appendix to this pleading. [A5-A7][1]

The decision of the United States District Court for the Middle District of Florida is reported at 763 F.Supp. 1110, and is likewise reproduced in the Appendix to this pleading. [A8-A52].

The decision of the Florida Supreme Court, which denied relief as to the claim now at issue, is reported at 532 So.2d 1048 (Fla. 1988), and is also set forth in the Appendix. [A53-A60].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on May 29, 1991. The Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 23, 1991, and Petitioner's timely Motion to Stay Mandate was granted on August 20, 1991; copies of these orders are reproduced in the Appendix to this pleading. [A1-A4]. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States of America are involved:

Amendment XIV, which provides, in pertinent part:

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1 [A___] represents a citation to the materials contained in the appendix to this pleading.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On March 15, 1984, David Alan Gore was convicted of first degree murder, kidnapping and sexual battery in Pinellas County Circuit Court, in regard to the July 26, 1983 kidnapping and murder of seventeen year old Lynn Elliott, and the kidnapping and sexual batteries upon her fourteen year old companion, Regan Martin. After the guilty verdicts were announced, a charge conference for the penalty phase was conducted, at the conclusion of which the trial court inquired of the parties what evidence they intended to present during the penalty proceeding the following day. Defense counsel proffered that he would present several relatives to testify that, based on the discovery of a half-empty vodka bottle and prescription drugs in Gore's bedroom, their observations of Gore at the time of his arrest, and the tape of his confession taken immediately after his arrest, they believed Gore had been drinking when he committed the crimes. Defense counsel further proffered that these relatives would testify that

Gore was acting under the domination of his cousin and co-defendant, Fred Waterfield.

The prosecutor objected to the admission of the proffered evidence as being irrelevant, as there was no evidence Gore had been drinking that day, and Fred Waterfield, although present during the abductions, had not initiated the criminal episode and was not present at all during the sexual batteries and murder. The trial court sustained the objection and barred defense counsel from presenting the proffered evidence during the penalty phase. (Trial Transcript 1594-1598). The jury subsequently recommended death by a vote of eleven to one, and on March 16, 1984, the trial court imposed the death sentence for the murder of Lynn Elliott.

On direct appeal to the Florida Supreme Court, Gore did not raise a specific claim pursuant to *Lockett v. Ohio,* 438 U.S. 586 (1978), relative to the exclusion of the proffered alcohol and domination mitigating evidence, although he did argue in Claim XVIII that the exclusion violated Florida law regarding the right to present nonstatutory mitigating evidence. In its opinion on direct appeal affirming Gore's convictions and death sentence, *Gore v. State,* 475 So.2d 1205 (Fla. 1985), *cert. denied,* 475 U.S. 1031 (1986), the Florida Supreme Court did not address this issue.

In his subsequent motion for post-conviction relief, Gore raised a *Lockett* claim based on the exclusion of the alcohol and domination mitigating evidence, as well as a claim that trial counsel was ineffective in his investigation and presentation of the alcohol and domination evidence at the penalty phase. Gore's motion for post-conviction relief was denied by the trial court. In its joint opinion affirming the denial of post-conviction relief and denying Gore's state habeas corpus petition, *Gore v. Dugger, Gore v. State,* 532 So.2d 1048 (Fla. 1988), the Florida Supreme Court did not specifically

address the *Lockett* claim. In discussing Gore's ineffective assistance claim, however, the court recognized that "Gore should have been permitted to introduce such evidence for whatever weight it might be given." *Id.* at 1050.

Gore then filed his petition for writ of habeas corpus in federal district court. Gore raised his *Lockett* claim therein, placing additional reliance on this Court's decision in *Hitchcock v. Dugger,* 481 U.S. 393 (1987). Petitioner conceded that the exclusion of the alcohol and domination mitigating evidence violated *Lockett/Hitchcock,* but argued that the error was harmless because the evidence presented at the guilt phase demonstrated that Gore was not under the influence of alcohol during the crimes, and that Gore orchestrated the kidnappings and committed the sexual batteries on his own, with virtually no assistance from Waterfield.

In its final order, *Gore v. Dugger,* 763 F.Supp. 1110 (M.D. Fla. 1989), the District Court granted the writ as to Gore's death sentence, finding that the *Lockett/Hitchcock* error was not harmless. After reviewing the various opinions of the Eleventh Circuit as to the standards for determining harmless error under *Hitchcock,* the District Court concluded that where relevant mitigating evidence has been excluded, such exclusion can never be harmless regardless of its weight, which the District Court acknowledged "may not be strong." Indeed, in rejecting Gore's claim that trial counsel was ineffective at the guilt phase for not pursuing an intoxication defense, the District Court noted that "there was no direct evidence that Petitioner had been drinking or using drugs on the day of the offense" and that the arresting officers testified he did not appear to be under the influence at the time of his arrest, a short time after the offense. The District Court denied relief as to Gore's convictions.

On appeal to the United States Court of Appeals for the Eleventh Circuit, *Gore v. Dugger,* 933 F.2d 904 (11th Cir. 1991), the Circuit Court adopted the District Court's findings and analysis as to the guilt phase claims, and agreed with the District Court's conclusion that the *Lockett* error was not harmless, though it declined to adopt the District Court's "...conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations." *Id.,* at 905. The Circuit Court explicitly recognized the continuing disagreement amongst the judges of that court "...with respect to the issue of the scope of the harmless error doctrine in such situations." *Id.* Rather than attempt to reconcile the conflict or announce its own formula, the panel below sidestepped the issue, stating "However, in this matter we need not wrestle with such larger questions." *Id.* The Court reasoned that it did not need to address the issue because the panel members all agreed that in this particular case, the error was not harmless.

Petitioner's motion for rehearing and suggestion for rehearing en banc was denied July 23, 1991, and Petitioner's motion to stay mandate was granted August 20, 1991.

REASON FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF ***LOCKETT V. OHIO,*** *438 U.S. 586 (1978) and* ***HITCHCOCK V. DUGGER,*** *481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON ITS RECOGNITION THAT CONFLICTING STANDARDS FOR HARMLESS ERROR HAD BEEN APPLIED BY THE CIRCUIT COURT IN ITS PRIOR DECISIONS, AND ANY ATTEMPT TO "WRESTLE" WITH THE ISSUE WOULD ONLY RESULT IN FURTHER CONFLICT.*

It is not unusual for individual judges of an appellate tribunal, and different panels within that tribunal, to hold widely disparate views on a particular issue.[2] What is unusual and indeed virtually unprecedented is for various panels of a United States Court of Appeals to continue to acknowledge that no agreement on a crucial constitutional issue has been reached, while simultaneously refusing any attempt to resolve the conflict via en banc review. Yet that is precisely the situation now existing in the Eleventh

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2 Indeed, such was cited by Alexander Hamilton, in Federalist Paper No. 22, in support of his argument for the necessity of a Supreme Federal judicial body in the plan of the convention:

> There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superin-tendence and authorized to settle and declare in the last resort a uniform rule of civil justice.

Circuit with regards to the standards for determining harmless error in the *Lockett/Hitchcock* context.

The Eleventh Circuit has analyzed the harmfulness of *Lockett/Hitchcock* error in ten other Florida cases,[3] and decided the issue without analysis in four more.[4] The opinion below, the court's most recent effort, barely qualifies for the former category, as the court's harmless error analysis consumes but a single paragraph.[5] The court's few words do however speak volumes concerning the Eleventh Circuit's inability to formulate a coherent, consistent doctrine in this critical area.

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3 *Jackson v. Dugger*, 931 F.2d 712, (11th Cir. 1991), *Aldridge v. Dugger*, 925 F.2d 1320 (11th Cir. 1991), *Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991), *Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989), *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2628 (1990), *Tafero v. Dugger*, 873 F.2d 249 (11th Cir. 1989), *Jones v. Dugger*, 867 F.2d 1277 (11th Cir. 1989), *Knight v. Dugger*, 863 F.2d 705 (11th Cir. 1988), *Clark v. Dugger*, 834 F.2d 1561 (11th Cir. 1987), and *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987).

4 *See, Hargrave v. Dugger*, 832 F.2d 1528 (11th Cir. 1987 *(en banc)*, *cert. denied*, 489 U.S. 1071 (1989), *Messer v. Florida*, 834 F.2d 890 (11th Cir. 1987), *Stone v. Dugger*, 837 F.2d 1477 (11th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989) and *Ruffin v. Dugger*, 848 F.2d 1512 (11th Cir. 1988), *cert. denied*, 488 U.S. 1044 (1989).

5 The panel's analysis of the issue reads thusly in its entirety:

> It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in such situations. However, in this matter, we need not wrestle with such larger questions. This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the *Lockett/Hitchcock* principle cannot be found to be harmless. We therefore AFFIRM the judgment of the district court, but decline to adopt its conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations.

The court below begins by acknowledging the lack of agreement within the Circuit on the scope of *Lockett/Hitchcock* harmless error analysis. It then offers the incredible observation that it need not "wrestle" with the issue of the proper scope of the doctrine, since all three panel members had arrived, by some unknown route, at the unanimous conclusion that the error was not harmless. The court then concludes by expresly not adopting the District Court's conclusions regarding the proper scope of the doctrine, the basis for the disagreement again being left to the reader's imagination.

In this the fifteenth *Lockett/Hitchcock* harmless error issue decided by the Eleventh Circuit, the court has now reached the point where it not only admits it cannot formulate a coherent doctrine, but also declares that the articulation and application of such a doctrine is unnecessary to the determination of harmless error in a given case. It is unnecessary because, apparently, the members of the panel know harmless error when they see it.[6]

That the prior decisions of the Eleventh Circuit are in hopeless conflict is a proposition which cannot be legitimately questioned. In *Tafero v. Dugger,* 873 F.2d 249 at 252, n.5 (11th Cir. 1989), the court first acknowledged that "...we are aware of conflicting viewpoints in this circuit concerning the application of a harmless *Hitchcock* error standard," and did so again in *Delap v. Dugger,* 890 F.2d 285 at 306, n.23 (11th Cir. 1990), *cert. denied,* ___ U.S. ___, 110 S.Ct. 2628 (1990), stating "There is some disagreement in this Circuit as to the

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6 "I'll know it when I see it" reasoning has incurred nearly a half century of judicial condemnation and ridicule, yet it has been employed by the panel below, not because of some regressive judicial philosophy, but rather out of frustration brought on by the complete lack of uniformity in the prior opinions of the Eleventh Circuit.

proper role of the habeas court in weighing aggravating and mitigating evidence in a *Hitchcock* situation."

The polite phrase "some disagreement," also employed by the panel below, does not quite capture the magnitude of the underlying doctrinal conflict within the Eleventh Circuit. The court has disagreed on whether the strength of the aggravating factors should be considered in assessing the harmfulness of the error, a dispute which could hardly be more fundamental to the concept of harmless error. *See Tafero v. Dugger,* 873 F.2d 249 at 252, n.4 (error harmless in large part due to overwhelming strength of aggravating factors), as contrasted with *Knight v. Dugger,* 863 F.2d 705 at 710 (11th Cir. 1988) (number of aggravating factors improper basis for determining harmless error) and *Delap v. Dugger,* 890 F.2d 285 at 306, n. 23 (it is "doubt(ful)" that "a *Hitchcock* error may be deemed harmless because the aggravating factors are strong"). In most cases the court has ignored the strength of the aggravating factors altogether.[7]

The other area of fundamental disagreement is whether the court will examine the weight of the excluded mitigating evidence, or whether it will automatically refuse to find harmless error where any relevant mitigating evidence is excluded. In *Jackson v. Dugger,* 931 F.2d at 716, the court indicated that the excluded mitigating evidence should be examined to determine if it is "significant." If so, the error could not be deemed harmless. *See also Jones v. Dugger,* 867 F.2d at 1279, stating that error would be harmless where excluded evidence is "insignificant." On the other hand, in *Booker v. Dugger,* 922 F.2d 633 at 635, the court reviewed its

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7 *See Jackson v. Dugger,* 931 F.2d 712, 716-18 (11th Cir. 1991), *Booker v. Dugger,* 922 F.2d 633 at 636 (11th Cir. 1991) *Aldridge v. Dugger,* 925 F.2d 1320 at 1328-30 (11th Cir. 1991), *Demps v. Dugger,* 874 F.2d 1385 at 1388-91 (11th Cir. 1990), *Jones v. Dugger,* 867 F.2d 1277 at 1279, 80 (11th Cir. 1989), and *Magill v. Dugger,* 824 F.2d 879 at 893 (11th Cir. 1987).

prior decisions and found that the error could only be harmless where counsel purposely refrained from presenting mitigating evidence or where none was available. In other words, the exclusion of any relevant evidence precluded a finding of harmless error. That is precisely the position espoused by the District Court below, and by the concurring opinion of Judge Clark in *Demps v. Dugger,* 874 F.2d 1385 at 1395, as well as the dissenting opinion of Judge Johnson therein.

In assessing the extent of the disagreement within the Eleventh circuit, it should further be noted that in *Demps, Knight* and *Ruffin v. Dugger,* 848 F.2d 1512 (11th Cir. 1988), there is no true majority opinion, in that each of the three panel members issued a separate opinion on this issue.

In Florida the sentencer, the trial judge, is required to weigh the strength of the aggravating factors against that of the mitigating factors, and to impose death if sufficient aggravating factors exist *and* the mitigating factors are unsufficient to outweigh the factors in aggravation. See § 921.141(2), Fla. Stat. (1977), and *Proffit v. Florida,* 428 U.S. 242 (1976). The panel opinions of the Eleventh Circuit conflict over whether the aggravating side of the sentencing equation should be considered in the harmless error formula. They further conflict over whether the exclusion of relevant mitigating evidence automatically renders the error harmful, or whether the mitigating evidence must possess certain weight before the error is deemed harmful. These conflicts reach the opposite ends of the spectrum for the possible scope of harmless error analysis in the *Lockett/Hitchcock* context, and are truly irreconcilable.

The end result of this fundamental inconsistency is that *Lockett/Hitchcock* error cases are subject to a two stage lottery. The first stage of the lottery occurs in the Federal District Courts, where the court must guess as to the correct

scope of the doctrine.[8] In the instant case the District Court's guess was, according to the panel below, an incorrect one. That the District Court had to wade through a sea of conflicting pronouncements of the Eleventh Circuit in order to hazard its best guess at the correct doctrine,[9] offers vivid testament to the need for a definitive resolution, a resolution which the Eleventh Circuit has steadfastly refused to provide.

The second stage of the lottery is in the Eleventh Circuit itself, which again can select from the full range of views found in its prior opinions. The choice of doctrine, and thus quite possibly the ultimate result, will turn upon the composition of the panel. Such is the current state of affairs in the Eleventh Circuit.

Moreover, the effects of the Eleventh Circuit's fundamental inconsistency on this issue are not limited to Florida. *See Richardson v. Thigpen,* 883 F.2d 895, 897-899 (11th Cir.

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8 Certainly, the Florida courts are left to wonder why the federal appellate bench is unable to articulate a consistent harmless error "standard" to be applied in *Hitchcock / Lockett* issues. The Florida courts routinely apply a workable "harmless error standard" to the cases that they review prior to their entry into the federal judiciary. Cf. Gore v. Dugger, 532 So.2d at 1048.

9 In his arguments in support of the convention's plan for a six year term for members of the senate, Alexander Hamilton, in Federalist Paper No. 62, noted the deleterious effects flowing from inconsistencies in the law, effects which the District Court surely felt with full force below:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?

1989) (*Hitchcock* claim raised by Alabama petitioner), *cert. denied,* ___ U.S. ___, 110 S.Ct. 17 (1989).

The instant case presents a typical Lockett type error, rather than the specific Florida jury instruction issue found in *Hitchcock.* The *Lockett* error herein could just as easily have occurred in any of the other thirty-six states with capital punishment. Had this error occurred outside the Eleventh Circuit, that particular state's supreme court, the federal district and federal circuit courts would all logically look for guidance to the Eleventh Circuit, which due to its wealth of *Hitchcock* experience presumably would have honed *Lockett* harmless error doctrine to a fine edge. In so doing these courts would find support for the most liberal rule[10] as well as the most conservative,[11] and everything in between. The Eleventh Circuit is certainly the court for all seasons in this regard, and its disparate decisions might well prove the source of intercircuit conflict in the years to come, in addition to the intracircuit conflict which petitioner now asks this Court to resolve.

This Court certainly has jurisdiction to grant the writ to resolve the conflict within the Eleventh Circuit. *See John Hancock Insurance Company v. Bartels,* 308 U.S. 180, 181 (1939) (certiorari granted due to intracircuit conflict and importance of question presented).

Petitioner does not seek certiorari review because the Eleventh Circuit reached the wrong result in this particular case, though obviously Petitioner is confident that the facts

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10 *See Booker* (harmless error limited to situations where no valid mitigating evidence was excluded), and concurring opinion of Judge Clark in *Demps* (same).

11 *See Tafero* (harmless error can be based on overwhelming strength of aggravating factors and relative weakness of excluded mitigating evidence).

support its contention. Nor does Petitioner seek review because of any errors in the panel's legal analysis, as the panel undertook no legal analysis. Rather, Petitioner seeks this Court's review because of the underlying reason for the panel's lack of analysis, i.e., the Eleventh Circuit's diametrically opposing precedents in this area.

This Court should grant review because the issue is fundamental. In assessing whether a *Lockett* sentencing phase error (and indeed any type of sentencing phase error) is harmless, does the reviewing court examine the entire sentencing equation,[12] including the strength of the evidence the sentencer considered in aggravation and mitigation, and the projected effect of the constitutional error, which in the *Lockett* context consists of the projected impact of the excluded mitigating evidence? Or does the court ignore completely the aggravating side of the equation, which consists of factors derived from the facts of the offense and the defendant's criminal record? *Note: Payne v. Tennessee,* 501 U.S. ____, 115 L.Ed.2d 720, 111 S.Ct. ____ (1991). Secondly, if the weight of the aggravating factors is irrelevant, is the weight of the excluded mitigating evidence to be considered, or does the exclusion of any relevant mitigating evidence automatically preclude a finding of harmless error? *Note: Walton v. Arizona,* 497 U.S. ____, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990).

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12 Guilt phase errors are examined in this manner, with the strength of the evidence of guilt weighed against any exculpatory evidence, with the projected effect of the constitutional violation being the final factor. In other words, the totality of the circumstances. *See Chapman v. California,* 386 U.S. 18 (1967).

Although this Court addressed the Lockett harmless error issue in *Skipper v. South Carolina*, 476 U.S. 1 (1986),[13] this Court did not announce a comprehensive Lockett harmless error formula.

In *Satterwhite v. Texas*, 486 U.S. 249 (1988), this Court considered whether a Sixth Amendment violation at the sentencing phase was harmless, but again this Court's analysis did not set forth a broad formula comparable to that announced in *Chapman v. California*, 386 U.S. 18 (1967), for guilt phase errors. This Court did however acknowledge in *Satterwhite* that the dictates of *Chapman* do apply to sentencing phase errors,[14] which indicates this Court's

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13 This Court did not conduct a specific harmless error analysis in *Lockett* or *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In *Lockett* the excluded mitigating evidence included the fact that Lockett was only an aider and abettor, had no knowledge a murder would occur, had no significant criminal history, was of low intelligence, and only 21 years old at the time of the offense. In *Eddings*, the excluded evidence consisted of compelling evidence of the sixteen year old defendant's troubled and physically abusive upbringing, and a severe emotional disturbance prior to and during the murder. Given the undisputed strength of the excluded mitigating evidence and the lack of an overwhelming case in aggravation, harmless error was not an issue in either case. In *Hitchcock* this Court did not conduct a harmless error analysis because the State never asserted that the error was harmless. 481 U.S. at 399.

14 This Court stated in *Satterwhite:*

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Accordingly, we hold that the *Chapman* harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith.*

Satterwhite v. Texas, 486 U.S. at 258.

acceptance of a totality of the circumstances harmless error test.

Petitioner offers no argument herein as to the propriety of one formula over another, as whether this Court would ultimately agree with Petitioner's position is irrelevant to the necessity for review by this Court. Review should be granted because the Eleventh Circuit's precedents are in hopeless conflict concerning the scope of a crucial constitutional doctrine.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Petitioner respectfully prays that the petition for writ of certiorari will be granted.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Order Granting Stay of Mandate
Eleventh Circuit Court of Appeals A-1

Order Denying Rehearing
Eleventh Circuit Court of Appeals A-3

Opinion, May 29, 1991
Eleventh Circuit Court of Appeals A-5

Memorandum Opinion, August 17, 1989
United States District Court Middle District–
Tampa A-8

Opinion, August 18, 1988
Supreme Court of Florida A-53

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-4026

DAVID ALAN GORE,

Petitioner-Appellant,
Cross-Appellee,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

( ) The motion of *appellee/cross-appellant, Harry K. Singletary,* for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of *appellee/cross-appellant, Harry K. Singletary,* for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *October 21, 1991,* the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme that the certiorari

petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____/s/_____
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-4026

DAVID ALAN GORE,

Petitioner-Appellant,
Cross-Appellee,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTIONS OF REHEARING EN BANC

(Opinion May 29, 1991 , 11th Cir., 1991, ___ F.2d___).

Before: TJOFLAT, Chief Judge, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it,

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-4026

D.C. Docket No. 89-203 CIV-T-10(C)

DAVID ALAN GORE,

Petitioner-Appellant,
Cross-Appellee,

versus

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(May 29, 1991)

Before TJOFLAT, Chief Circuit Judge, and FAY and JOHNSON, Circuit Judges.

PER CURIAM:

The district court granted partial relief in this petition filed pursuant to 28 U.S.C. § 2254. The state appeals the granting of relief. The petitioner cross-appeals the denial of relief as to those claims found to be without merit. We affirm.

Petitioner was convicted of first degree murder, two counts of kidnapping, and three counts of sexual battery.

He was sentenced to death for the first degree murder count. Sentences of life imprisonment were imposed on the kidnapping and sexual battery counts. These convictions and sentences were affirmed on appeal, and petitioner's post-conviction remedies under state law have been exhausted.

On consideration of Gore's *habeas corpus* petition, the district court conducted a detailed analysis of each of the seventeen claims presented and entered a comprehensive and scholarly Memorandum Opinion published at ___ F. Supp. ___ (M.D. Fla. 1991). We agree with the findings and conclusions of the district court as set forth in its opinion.

We clarify our ruling, however, in one regard. Gore claimed that his rights under the sixth, eighth, and fourteenth amendments were violated when the state trial court precluded him from presenting certain mitigating evidence to the sentencing jury in violation of *Hitchcock v. Dugger,* 481 U.S. 393 (1987) and *Lockett v. Ohio,* 438 U.S. 586 (1978) (plurality opinion).[1] The district court agreed. However, it then went on to recognize that under the law of our circuit such a violation is subject to the harmless error doctrine. *See Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir. 1989). The district court discussed and analyzed all of the recent opinions of our court, and drew certain conclusions about the scope of this harmless error doctrine when applied in *Lockett/Hitchcock* situations.

It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of

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1 Under *Hitchcock* and *Lockett,* the eighth amendment requires that a capital sentencing jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir. 1989) (emphasis in original) (citations omitted).

our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in such situations. However, in this matter, we need not wrestle with such larger questions. This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the *Lockett/Hitchcock* principle cannot be found to be harmless. We therefore AFFIRM the judgment of the district court, but decline to adopt its conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 89-203 CIV-T-10(C)

DAVID ALAN GORE,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

_____/

MEMORANDUM OPINION

This is a petition for a writ of habeas corpus pursuant to 28 USC § 2254 brought by a state prisoner under sentence of death. The petition was filed on February 14, 1989, together with an application for stay of the Petitioner's execution then set for February 16, 1989. In order that the Petitioner's claims could be judiciously considered, I entered a stay of execution on February 14, 1989.

The complete record has now been compiled. The issues have been briefed and the Petitioner's claims have been fully considered. Upon due consideration, I have concluded that Petitioner's claim based on *Hitchcock v. Dugger,* 107 S.Ct. 1821 (1987) and *Lockett v. Ohio,* 98 S.Ct. 2954 (1978) is meritorious and that the petition must be granted in order to afford the Petitioner a new sentencing hearing. With respect to all other claims, the petition is without merit and is denied.

FACTS SURROUNDING THE OFFENSE

The Supreme Court of Florida, in disposing of the Petitioner's direct appeal, *Gore v. State,* 475 So.2d 1205, 1206 (Fla. 1985), recited the facts of the case as follows:

> Gore and his cousin picked up fourteen-year-old Regan Martin and seventeen-year-old Lynn Elliott who were hitchhiking to the beach. After the glove compartment in the pickup truck fell open and a gun became visible, Gore took the gun and held it to Regan's head. He grabbed the two girls' wrists and held them together. Gore then said that they should take the girls to Gore's home. He told the girls that if they said or did anything, they would be killed. When they arrived at his home, the girls were handcuffed and taken into a bedroom. The girls then were separated, and Lynn was tied up while Regan was handcuffed. Gore cut Regan's clothes off of her and sexually assaulted her on three separate occasions. Regan testified that she heard noises in the other room after Gore had left her. She heard Gore tell Lynn to shut up or he would kill her. Gore also told Regan to be quiet or he would slit her throat and that he would do it anyway. Gore then put Regan in the closet, and, after he left, she heard two or three shots. Gore then came back into the room and put Regan in the attic where she stayed until rescued by a police officer.
>
> Michael Rock, a fifteen-year-old boy, testified that on July 26, 1983, while riding his bicycle in the area of Gore's home, he heard screaming and observed a naked girl running down the driveway being chased by Gore who was also naked. He saw Gore catch up to her, drag her back to a palm tree,

and shoot her twice in the head. Rock went home and told his mother, and she called the police. The police arrived and surrounded Gore's home. Lynn's body was found in the trunk of the car in the driveway. Her arms and legs had been tightly bound with rope. She had multiple abrasions on her body consistent with falling and being dragged. The gun used to kill her was found in Gore's home.

HISTORY OF THE CASE

The Petitioner was indicted, tried and found guilty of first degree murder, two counts of kidnapping and three counts of sexual battery. Following a sentencing hearing, the Petitioner was sentenced to death for first degree murder. (R. 845-47).[1] The trial court also sentenced Petitioner to life imprisonment on each of the two counts of kidnapping, to be served concurrently, and on each of the three counts of sexual battery, to be served concurrently with each other but consecutively to the sentences imposed on the kidnapping charges. (R.848-54).

On August 22, 1985, the Florida Supreme Court affirmed the convictions and sentences. *Gore v. State,* 475 So.2d 1205 (Fla. 1985). The United States Supreme Court denied certiorari on February 24, 1986. *Gore v. Florida,* 106 S.Ct. 1240 (1986).

On February 24, 1988, the Petitioner filed a motion for post conviction relief pursuant to Rule 3.850, Fla. R. Crim.

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1 The record of the proceedings in the Petitioner's trial and direct appeal will be referred to by the symbol "R" followed by the appropriate page number. The record of the proceedings in the state court post conviction evidentiary hearing will be referred to by the symbol "EH" followed by the appropriate page number.

P., in the state trial court. Shortly thereafter, the Governor of Florida signed Petitioner's first death warrant. Execution was scheduled for May 4, 1988.

On April 4, 1988, Petitioner filed a petition for a writ of habeas corpus in the Florida Supreme Court.

The state trial court conducted an evidentiary hearing on Petitioner's Rule 3.850 motion on April 15, 18 and 19, 1988. At the conclusion of the hearing, the court entered on order denying Petitioner's motion. (EH 1121-26).

The Florida Supreme Court consolidated Petitioner's appeal from the trial court's denial of his Rule 3.850 motion with his petition for a writ of habeas corpus and, following oral argument, granted Petitioner a stay of execution. On August 18, 1988, the Court affirmed the trial court's denial of Petitioner's Rule 3.850 motion and also denied his petition for a writ of habeas corpus. *Gore v. State/Gore v. Dugger,* 532 F.2d 1048 (Fla. 1988).

The Governor of Florida signed Petitioner's second death warrant on January 31, 1989. The Petitioner filed the present petition in this Court on February 14, 1989, together with an application for stay of the execution then scheduled for February 16. A stay was entered due to the short time remaining before the scheduled execution and the necessity that the Court review the voluminous record.

The State does not dispute that Petitioner has exhausted his state remedies as required by 28 USC § 2254; and, as previously noted, the state trial court has conducted an evidentiary hearing. The court considered and determined at that time the Petitioner's claims, including his claim of ineffective assistance of counsel. While factual findings of the state court are entitled to a presumption of correctness under 28 USC § 2254(d) and *Sumner v. Mata,* 101 S.Ct. 764 (1981), claims of ineffective assistance of counsel present

mixed questions of law and fact, and as such, the state court's determination of ineffective assistance claims are not entitled to that presumption. *Douglas v. Wainwright,* 714 F.2d 1532, *vacated* 104 S.Ct. 3575, *aff'd on remand* 739 F.2d 531 (11th Cir. 1984). Nevertheless, review of the transcript of the post conviction proceedings in the state court demonstrates that the Petitioner was afforded a full and fair hearing within the meaning of 28 USC 2254(d)(6), and that transcript, taken together with the trial record, excludes the necessity of an evidentiary hearing on any of the claims now before this Court.[2]

The Petitioner has presented seventeen claims of alleged constitutional deprivation. Each will be considered in turn.

I

In his first claim Petitioner asserts that his rights under the Sixth, Eighth and Fourteenth Amendments were violated when the state trial court precluded him from presenting certain mitigating evidence to the sentencing jury in violation of the Supreme Court's decisions in *Hitchcock v. Dugger,* 107 S.Ct. 1821 (1987) and *Lockett v. Ohio,* 98 S.Ct. 2954 (1978).

In *Hitchcock* and *Lockett* the Court made it clear that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, requires that a capital sentencing jury not "be precluded from considering, as a mitigating

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2 *See* Rule 8, Rules — Section 2254 Cases (adopted pursuant to 28 USC § 2254). Petitioner contends that the state court did not give him a complete hearing because it did not receive evidence on his claim concerning the ineffectiveness of his mental health expert. As is more fully discussed *infra,* given the Court's resolution of this issue, no hearing is needed on this claim.

factor, *any* aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Jones v. Dugger,* slip op. at 1718 (11th Cir. February 28, 1989). (emphasis in original) (citations omitted). In this case Petitioner contends that the trial court committed *Hitchcock/Lockett* error when it excluded mitigating evidence on two subjects: Petitioner's drug and alcohol abuse, and the dominance exercised over him by his cousin, Frederick Waterfield. With respect to his use of drugs and alcohol, Petitioner attempted to introduce evidence at his sentencing hearing to show that he had been drinking and taking pills around the time of the commission of the offenses. Defense counsel stated to the court that he planned to have members of Petitioner's family testify both that he had been acting strangely during the days prior to the murder and that, because of the way he was acting when they saw him shortly after his arrest, they believed that he had been drinking. Petitioner also sought to introduce evidence that, after the crime, a half empty bottle of vodka and some pills were found in his bedroom. The trial judge refused to admit any of this evidence ruling that it was irrelevant because there was no direct evidence that Petitioner was drinking while the offenses were being committed and because there was testimony from the surviving victim and law enforcement personnel to the effect that Petitioner did not appear drunk. (R. 3047-56).

In evaluating Petitioner's *Lockett/Hitchcock* claim, this Court is, of course, bound by the Eleventh Circuit's interpretation of those decisions. One of the Circuit's most recent decisions on the point is *Demps v. Dugger,* slip op. at 1996 (11th Cir. March 28, 1989). Because the *Demps* case produced an opinion by each of the members of the panel, however, it is necessary to review those opinions in some detail to determine the current state of *Lockett/Hitchcock* law in the circuit.

In *Demps* the petitioner was convicted of first degree murder and was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on *Hitchcock* grounds by arguing that the trial court's instruction to the jury impermissibly precluded them from considering non-statutory mitigating evidence. The Court of Appeals agreed, concluding that "the judge gave an instruction functionally identical to that [erroneously] given in *Hitchcock.*" *Demps,* slip op. at 2000. The three judges on the panel did not agree, however, on how to properly analyze and evaluate the *Hitchcock* claim.

In the lead opinion for the court, Judge Fay began his analysis by stating that *Hitchcock* error can be harmless under "the strict *Chapman* criterion." *Id.* at 2001 citing *Chapman v. California,* 87 S.Ct. 824 (1967). And, for a *Hitchcock* error to be harmless, a court must, after an in depth review of the entire record, "determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence." *Id.* Judge Fay then examined each of the four types of evidence which Demps alleged would have influenced the jury to recommend life and concluded that since none of the evidence excluded from the jury's consideration would have affected

its sentencing recommendation, the *Hitchcock* error was harmless and resentencing not required. *Id.* at 2001-2.[3]

Judge Clark, in his special concurrence, agreed with Judge Fay that Demp's petition should be denied but disagreed with his handling of the *Hitchcock* claim because the analysis was based on the harmlessness of the *Hitchcock* error. *Id.* at 2005 (Clark, J., specially concurring). Judge Clark concluded that "[t]his case is not a potential *Hitchcock* error case. Although there was an erroneous *Hitchcock* instruction, there has been no showing that any credible non-statutory mitigating evidence exists." *Id.* at 2006 (Clark, J., specially concurring). Since Judge Clark concluded that the "evidence" Demps wished to present to the

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3 The four types of evidence offered by Demps and analyzed by Judge Fay were as follows:

(1) Evidence of "honorable military combat service." Judge Fay concluded that exclusion of this evidence from the jury's consideration was harmless because Demp's service record was not "honorable" at all. He was given one special court-martial, numerous other punishments, and a dishonorable discharge which was eventually upgraded to a general discharge. Judge Fay thus concluded that Demps's military record did not reflect favorably on his character and would not have influenced the jury to recommend life.

(2) Evidence of a history of drug abuse. Judge Fay concluded that exclusion of this evidence from the jury's consideration was also harmless because Demps's drug addiction predated his incarceration on unrelated charges and that no evidence existed to show that drugs or treatment for drug dependence influenced his participation in the prison murder.

(3) Evidence of a good prison record. Judge Fay concluded that exclusion of this evidence from the jury's consideration was harmless because Demps's prison record was not good and, in fact, indicated that he had a record of continuing disciplinary problems.

(4) Evidence that his two co-perpetrators received life sentences. Judge Fay concluded that exclusion of this evidence from the jury's consideration was harmless because Demps's prior criminal record was more severe than his co-perpetrators and that it was sufficient to justify imposing a more serious penalty. *Id.* at 2001-02.

jury did not reach the threshold of being *Hitchcock* mitigating evidence (because there were no facts to substantiate his claims), he did not believe that a *Chapman* harmless error analysis was necessary or appropriate. *Id.* at 2007 (Clark, J., specially concurring). Indeed, Judge Clark found the case to be comparable to *Clark v. Dugger,* 834 F.2d 1561 (11th Cir. 1987), *cert. denied,* 108 S.Ct. 1282 (1988), in which the court found:

> Here, however there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained, *supra,* Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever.

Clark, 834 F.2d at 1569 *quoted in Demps,* slip. op. at 2007 (Clark, J., specially concurring).

Although Judge Clark recognized that the *Clark* court had held that any *Hitchcock* error in that case was harmless under *Chapman,* he stressed that "harmless" was an incorrect label because "[w]here there is no nonstatutory mitigating evidence there can be no *Hitchcock* error and harmlessness need not be considered." *Id.* Further, he rejected the application of a harmless error standard in a case in which legitimate *Hitchcock* evidence might be offered stating that "[i]f such evidence exists, the case should be returned to the state court for resentencing..." *Id.* at 2006 (Clark, J., specially concurring) (citations omitted). Judge Clark explained that

> I deem it an inappropriate function for a federal court to weigh nonstatutory mitigating evidence against aggravating circumstances and decide

> whether a petitioner should get the death penalty as an alternative to a resentencing hearing. That is an invasion of the separate states' rights and obligations for their courts to insure appropriate sentencing in death penalty cases.... If there is credible evidence demonstrated by the petitioner, we should return the case to the state court for resentencing.

Id. at 2008 (Clark, J., specially concurring).

Dissenting on the *Hitchcock* issue was Judge Johnson. Initially, citing *Clark v. Dugger,* Judge Johnson agreed with Judge Fay that *Hitchcock* error may be harmless in some circumstances, but he immediately qualified his statement by noting that "this Court has only once found *Hitchcock* error to be harmless, *see Clark, supra,* and the Supreme Court has never found the error to be harmless in its four reversals of death sentences for failure of the sentencer to consider non-statutory mitigating circumstances."[4] *Id.* at 2008 (citations omitted) (Johnson, J., concurring in part, dissenting in part). Judge Johnson further noted that "[t]he *Knight* decision[5] leaves little room for the application of

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4 Subsequently, as discussed *infra,* in a recently released opinion, *Tafero v. Dugger,* slip op. at 2416 (11th Cir. May 1, 1989) (per curiam), the Circuit once again found a *Hitchcock* error to be harmless.

5 In *Knight v. Dugger,* 863 F.2d 705 (11th Cir. 1988), the Court of Appeals rejected the State's contention that the failure of the jury to consider all mitigating factors was harmless error because of the large number of aggravating factors that had been found. The *Knight* court stated:

> No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of *Lockett* and its progeny.

harmless error analysis, except in the situation where [no] non-statutory mitigating evidence could have been proffered." *Id.; see also Knight v. Dugger,* 863 F.2d 705 (11th Cir. 1988). Thus, Judge Johnson agreed with Judge Clark that applying a harmless error analysis to a *Hitchcock* error is inappropriate, except for the situation in which no mitigating evidence is offered (a circumstance which, as discussed *supra,* Judge Clark considers to be outside the realm of *Hitchcock* altogether).

Judge Johnson's disagreement with Judge Clark, and his dissent from the result reached by the court, stemmed from the fact that he believed the case should be remanded to the district court for inquiry into whether Demps had any legitimate mitigating evidence to present instead of having the Court of Appeals make that initial factual determination. Judge Johnson believed that if any of Demps's claims were true, then excluding them from the jury's consideration was constitutional error. *Id.* at 2009 (Johnson, J., concurring in part, dissenting in part). Thus, Judge Johnson concluded that "[t]he determination of whether the error committed in Demps' case was harmless or not depends entirely on the truth of his claim that unconsidered mitigating factors existed." *Id.*

A synthesis of the three opinions in *Demps* leads the Court to conclude that the following propositions were adopted by a majority of the panel and thus constitute binding precedent which this Court must apply. First, a district court must determine when reviewing a *Hitchcock* claim, whether the mitigating evidence sought to be placed before the jury is, in fact, mitigating evidence. In making this determination the district court may review not only the evidence presented on the issue by the petitioner but may also consider any evidence advanced by the State which contests the truthfulness or relevancy of the petitioner's evidence. If the court concludes that the evidence offered by the petitioner

is either patently untrue or irrelevant, *i.e.,* that it is not mitigating, then it was not error (or, at worst, was harmless error) for the trial court to have precluded the jury from considering it. Second, however, if the excluded evidence does have some mitigating value, then the court should not attempt to balance the weight of all the evidence presented at the sentencing hearing by conducting a harmless error review, but instead should vacate the death sentence and return the case to the state court for resentencing.

The Court of Appeals' recent decision in *Tafero v. Dugger,* slip op. at 2416 (11th Cir. May 1, 1989) (per curiam), does not alter this conclusion. In *Tafero* a different panel of the Court (consisting of Judges Vance, Kravitch and Hatchett) stated that *Hitchcock* error could be harmless and held that it was so in that case. *Id.* at 2419. The court noted, however, that the case

> parallels the situation in *Clark v. Dugger.* Tafero's counsel, like the *Clark* defendant's counsel, purposely presented no non-statutory mitigating evidence.... The *Clark* court held that any *Hitchcock* error was harmless because of the defendant's counsel's failure to present non-statutory mitigating evidence. Likewise, we conclude that any *Hitchcock* error by Tafero's counsel was harmless.

Id. at 2419 n.5.

Tafero, therefore, when examined in light of its facts, does not affect the Court's understanding of the law of the Circuit on the *Hitchcock* issue as established by *Demps;* and, applying that law to the facts of this case leads the Court to conclude that constitutional error was committed during Petitioner's sentencing hearing. The truthfulness of the alcohol and drug evidence sought to be introduced, the presence of the half empty bottle of vodka, the pills and the

Petitioner's relative's statements that he behaved as though he were under the influence, has not been questioned.[6] Nor can the evidence be considered irrelevant. The evidence could support an inference that the Petitioner had been drinking and/or taking pills at or about the time the murder was committed. This certainly can be considered as mitigating by the sentencing jury.[7] *See e.g., Hargrave v. Dugger,* 832 F.2d 1528 (11th Cir. 1987); *Fead v. State,* 512 So.2d 176 (fla. 1987). Thus, although in the totality of the circumstances the Petitioner's mitigating evidence may not be strong, it is for the state jury and judge to decide what sentence is appropriate when *all* mitigating factors are considered. Since the jury did not have the opportunity to consider all

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6 Certainly, though the State has sought to disprove the truthfulness of the *inference* Petitioner hopes the jury draws from the evidence, that he was intoxicated at the time of the murder. However, this attack on the truthfulness of the ultimate conclusion is qualitatively different from an attack on the truthfulness or reliability of the actual evidence itself. Unlike the situation in *Demps* in which the State sought to disprove the evidence of the existence of an honorable discharge, the State does not argue here that the pills or vodka bottle were not found in Petitioner's room. Further, an attack on the inference a petitioner hopes a jury draws from truthful evidence cannot be adequate to sustain the exclusion of the evidence itself. Otherwise, a trial court could preclude a defendant's mother from testifying that her child was always a good boy when his record is to the contrary. Clearly this type of character evidence cannot be barred under *Lockett/Hitchcock.* Instead, it is the province of the jury to weigh its credibility.

7 The jury, of course, may also consider the State's evidence which it contends shows that the Petitioner was not intoxicated at the time of the offense.

mitigating evidence, the Petitioner's sentence of death was imposed in violation of the Eighth Amendment and relief must be granted on this claim.[8]

II

In his second claim Petitioner contends that he was deprived of his due process and equal protection rights under the Fourteenth Amendment, as well as his rights under the Fifth, Sixth and Eighth Amendments, because his court-appointed mental health expert failed to conduct a competent and professionally appropriate evaluation of him thereby overlooking numerous mitigating factors which could have been presented to the sentencing jury. More specifically, Petitioner asserts that Dr. David Tingle, the psychiatrist appointed by the Court at the Petitioner's request,[9] rendered professionally inadequate services in that he failed:

> to follow or even understand the simple requests of counsel regarding the scope of the evaluation, to conduct proper testing, and to review the amply available and extensive background materials and

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8 As previously indicated, Petitioner has raised one other *Lockett/Hitchcock* claim arguing that the trial court improperly excluded from the jury's consideration evidence concerning Waterfield's domination over him. Given the Court's determination that a resentencing is mandated because of the exclusion of the drug and alcohol evidence, the Court need not consider this claim. The Court notes that in its opinion on Petitioner's Rule 3.850 motion, the Florida Supreme Court has already stated that this domination evidence should have been admitted at the sentencing phase. *Gore v. Dugger,* 532 So.2d 1048, 1050 (Fla. 1988). Thus, on resentencing the Petitioner will also be able to introduce this evidence.

9 The Court notes that in Petitioner's motion for apointment of psychiatrists and psychologists, he specifically requested "an order authorizing the defendant to retain the services of Dr. David Tingle, M.D., a competent and qualified psychiatrist." (R.32). The trial court granted Petitioner's motion and appointed Dr. Tingle. (R.413).

> collateral data which would have demonstrated [Petitioner's] life-long mental disabilities, his history of severe alcohol and substance abuse, the effects of intoxicants on his character, personality, behavior, and control, and a veritable plethora of information which would have, if properly assessed, evaluated, and related in a professionally competent manner, established myriad statutory and non-statutory mitigating circumstances.

(Petition for writ of habeas corpus, p. 75). Petitioner alleges that because Dr. Tingle's inadequate assistance with respect to investigating and evaluating potential mitigating evidence to be presented at the penalty phase, his sentence of death was imposed in an unfair and unreliable manner. Petitioner requests that this Court conduct an evidentiary hearing since the state court refused to hold a hearing on this claim.

In sum, Petitioner's claim is that his court-appointed psychiatrist rendered him ineffective assistance; and he relies on the Supreme Court's decision in *Ake v. Oklahoma,* 105 S.Ct. 1087 (1985), to support his contention that the Due Process Clause requires that a criminal defendant be given competent psychiatric assistance to aid him in preparing his defense, including the presentation of mitigating circumstances. *Ake* and its progeny, however, while establishing a limited right to court-appointed psychiatric assistance in presenting a defense, do not stand for the expansive proposition Petitioner asserts.

In *Ake,* the Supreme Court considered an indigent capital defendant's need for psychiatric assistance both at trial and at the penalty phase. With respect to the guilt phase, the Court held that as a matter of due process

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a

> significant factor at trial, the State must, at a minimum assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.

Ake, 105 S.Ct. at 1097. The Court's discussion of the need for psychiatric assistance during the penalty phase was considerably more narrow. The Court focused on the fact that in some states the jury is allowed to consider psychiatric evidence of the defendant's future dangerousness in fixing or recommending sentence. The Court held

> In such a circumstance, where the consequence of error is so great, the relevance of *responsive* psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing hearing.

Id. (emphasis added). *See also Thompson v. Wainwright,* 787 F.2d 1447, 1459 (11th Cir. 1986), *cert. denied,* 107 S.Ct. 1986 (1987).

In this case, Petitioner does not claim that he was denied the assistance of a psychiatrist in determining whether to present an insanity defense; hence, *Ake's* first principle is inapplicable. The Court concludes that *Ake's* second principle is similarly inapplicable because "[u]nlike the sentencing situation in *Ake,* [Petitioner's] prosecutor had no need to present psychiatric evidence to show an aggravating factor, and he presented none. The dangers and inequities which concerned the Court in Ake consequently did not exist." *Bowden v. Kemp,* 767 F.2d 761, 764 n.5 (11th Cir. 1985). *Ake* simply stands for the proposition that a defendant must be afforded psychiatric assistance at the penalty phase to rebut the State's own psychiatric evidence. Where

no such evidence is presented, *Ake* confers no constitutional right to state afforded psychiatric assistance at the penalty phase. Since, as previously noted, the State presented no psychiatric testimony during the penalty phase of Petitioner's trial, he cannot claim to have a federal right to the assistance of a psychiatrist at that phase of trial.

Petitioner also argues that the denial of the effective assistance of a psychiatrist at the penalty phase violated his rights under Florida law. Two recent decisions of the Florida Supreme Court appear to give criminal defendants a slightly expanded right under state law to the assistance of a psychiatrist at the penalty phase when there are "clear indications of either mental retardation or organic brain damage." *State v. Sireci,* 502 So.2d 1221, 1224 (Fla. 1987) *citing Mason v. State,* 489 So.2d 734 (Fla. 1986). In this case, however, the trial court specifically found that the Petitioner's right to a psychiatrist under state law was not violated and the Florida Supreme Court agreed. This Court's review of that decision is limited to the question of whether the state courts' finding on an issue of state law is "so unprincipled or arbitrary as to somehow violate the United States Constituion." *Barclay v. Florida,* 103 S.Ct. 3418, 3423 (1983). Upon review of the record, the Court cannot say that the state courts' decision was arbitrary or irrational. Petitioner, therefore, has failed to demonstrate that he is entitled to relief.

Accordingly, this claim is DENIED.

III

Petitioner asserts that he was convicted on the basis of statements obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. More specifically, Petitioner contends that the trial court impermissibly allowed certain statements he gave to law enforcement personnel to be

admitted into evidence in violation of *Miranda v. Arizona,* 86 S.Ct. 1602 (1966) and *Edwards v. Arizona,* 101 S.Ct. 1880 (1981). Petitioner argues that the statements he gave to Detectives Bevis and Dubose at the Sheriff's Office, which were later admitted into evidence at his trial, were obtained only after he had previously requested the presence of counsel.

Upon review of the record, the Court cannot agree with Petitioner that there was a *Miranda/Edwards* violation in this case. The testimony presented to the trial court during its hearing on Petitioner's motion to suppress discloses that immediately upon arrest at his parents' home Petitioner was read the *Miranda* warnings. (R.1222, Testimony of Lt. Curt Keuhn). In response, Petitioner indicated that he "had a lot of things to get off his chest" and then he wanted to speak with a lawyer. (R.1222, Testimony of Lt. C Keuhn; R. 1244 Testimony of Ofc. C.C. Walker; R.1307, Testimony of Det. Neil Bevis). Upon his arrival at the Sheriff's Office, Petitioner was reminded of his *Miranda* rights and he once again indicated a willingness to make certain statements without a lawyer being present. (R. 1311-12, Testimony of Det. N. Bevis). It was these statements which were admitted into evidence and about which Petitioner now complains.

Petitioner's argument that he explicitly or equivocally invoked his right to counsel is without merit. Petitioner clearly and unambiguously stated that he understood his rights[10] and that he wished to make certain statements to police before speaking with an attorney. Petitioner's statements both immediately after his arrest and again at the Sheriff's Office demonstrate an intent to waive his *Miranda* rights at least to the extent of making certain initial statements. Petitioner's mere mentioning of his desire to consult

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10 The Court notes that Petitioner was an auxiliary police officer who was trianed in arrest procedures and *Miranda* rights.

with an attorney at some time in the future (as opposed to a present request for an attorney) was not an equivocal request for counsel sufficient to require that the police terminate questioning until clarified. *See Bruni v. Lewis,* 847 F.2d 561, 564 (9th Cir.), *cert. denied,* 109 S.Ct. 403 (1988); *see also United States v. Jardina,* 747 F.2d 945, 949 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 1773 (1985) (the word attorney has no talismanic qualities; a defendant does not invoke his right to counsel merely be mentioning the word). Therefore, it was not erroneous for the trial court to deny Petitioner's motion to suppress and to permit his statements to be admitted into evidence.

Accordingly, this claim is DENIED.

IV

A jury can find an aggravating circumstance under Florida Statute § 921.141(5)(h) if they find that "[T]he capital felony was especially heinous, atrocious, or cruel." The Petitioner contends that the Florida Supreme Court has interpreted this statutory aggravating circumstance in an unconstitutionally overbroad manner in violation of *Maynard v. Cartwright,* 108 S.Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. The Petitioner further contends that the trial court's instructions to the jury failed to guide the jury's sentencing discretion and provided "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia,* 100 S.Ct. 1759, 1767 (1980). These arguments are without merit.

The Florida Supreme Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 282 So.2d 1, 9 (Fla. 1973). *See also Halliwell v. State,* 323 So.2d

557, 561 (Fla. 1975); *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975); *Alford v. State,* 307 So.2d 433, 445 (Fla. 1975). In light of the construction placed under § 921.141(5)(h) in these cases, the provision is not constitutionally overbroad. *Proffitt v. Florida,* 96 S.Ct. 2960, 2968 (1976).

In instructing the jury with respect to this statutory aggravating circumstance, the trial judge stated, in pertinent part:

> Now, the aggravating circumstances that you may consider are limited to any of the following that are established by the evidence...
>
> Now, the crime — the fourth, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. Now, this aggravating circumstance is only applicable if the State of Florida has proven beyond a reasonable doubt that the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies.
>
> The murder must have been a consciousless (sic) or pitiless crime which was unnecessarily torturous to the victim. (Tr. 3232-33).

This clarifying instruction substantially complies with the limiting construction placed upon § 921.141(5)(h) by the Florida Supreme Court as approved in *Proffitt.* Moreover, the Court agrees with the Florida Supreme Court that this aggravating circumstance was established beyond a reasonable doubt. *Gore v. State,* 475 So.2d 1205, 1210-11 (Fla. 1985). Section 921.141(5)(h) is not unconstitutional as applied in this case.

Accordingly, this claim is DENIED.

V

The Petitioner also contends that the aggravating circumstance set forth in Fla. Stat. § 921.141(5)(i) is unconstitutional on its face and as applied in this case. Section 921.141(5)(i) allows the sentencing court to find an aggravating circumstance where "the...homicide...was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The Petitioner argues that this aggravating factor does not genuinely narrow the class of persons eligible for the death penalty. *See Zant v. Stephens,* 462 U.S. 862, 877 (1982).

The Florida Supreme Court has held that § 921.141(5)(i) requires a "heightened" level of premeditation and, therefore, does narrow the class of persons eligible for the death penalty. In *Jent v. State,* 408 So.2d 1024 (Fla. 1981), cert. denied 457 U.S. 1111 (1982), the Court held that "the level of premeditation needed to convict in...a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i)." *Id.* at 1032. *See also Card v. State,* 453 So.2d 17, 23 (Fla. 1984), *cert. denied* 469 U.S. 989 (1985) ("premeditation must rise to a level beyond that which is required for a first degree murder conviction"). In *Brown v. State,* 473 So.2d 1260 (Fla. 1985) *cert. denied* 474 U.S. 1038 (1985), the court held that "[T]he factor places a limitation on the use of premeditation as an aggravating circumstance in the absence of some quality setting the crime apart from mere ordinarily premeditated murder." *Id.* at 1268. *See Combs v. State,* 403 So.2d 418, 421 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). The Eleventh Circuit Court of Appeals *en banc* has held that, given these limiting instructions, § 921.141(5)(i) sufficiently narrows the class of defendants eligible for the death penalty. *Harich v. Dugger,* 844 F.2d 1464, 1468-69 (11th Cir. 1988) (en banc) (specifically adopting relevant portions of the panel opinion in *Harich v.*

Wainwright, 813 F.2d 1082, 1101-04 (11th Cir. 1987). Subsection (5) (i) is therefore, not unconstitutional on its face.

The Petitioner further contends, however, that this aggravating circumstance has been inconsistently applied by the Florida Courts. This same argument was rejected in *Harich v. Dugger,* 844 F.2d 1464, 1468-69 (11th Cir. 1988) *(en banc).* The Court finds the Petitioner's arguments in this respect similarly unpersuasive. "[W]hile the line between 'ordinary' premeditation and the 'heightened' cold, calculated premeditation is a thin one, petitioner has not shown that the state has applied this factor in an unconstitutionally arbitrary manner." 813 F.2d at 1103. *See Harich v. Dugger,* 844 F.2d 1464, 1468-69 (11th Cir. 1988) *(en banc).* Moreover, the Court agrees with the Florida Supreme Court that the facts of this case are sufficient to show the heightened premeditation required for the application of subsection (5)(i). *Gore v. State,* 475 So.2d 1205, 1211 (Fla. 1985).

Accordingly, this claim is DENIED.

VI

Petitioner seeks relief on the basis that defense counsel was improperly restricted in making his closing argument in the penalty phase of the case.

Petitioner was prosecuted for first degree murder under two theories: premeditated murder and felony murder. During the closing arguments following the penalty phase, Petitioner's counsel sought to argue that if the jury believed that Petitioner's codefendant, Freddy Waterfield, had committed the murder and that Petitioner's conviction was based on felony murder, then the aggravating factors that

the capital murder was heinous, atrocious, or cruel and cold, calculated, and premeditated did not apply to Petitioner.[11]

A conviction based on felony murder when the defendant was not the triggerman would not, as a matter of Florida law, preclude the jury from considering these two aggravating factors during the sentencing phase. The State properly points out that the legal threshold to apply an aggravating factor is the defendant's conviction of a capital felony as opposed to the defendant's actual role in the crime. Defense counsel erroneously sought to argue that heinous and cruel, cold and calculated could only apply in the instance that the defendant did the actual killing. The Court properly prevented counsel from making that argument.[12] *United*

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11 Petitioner's counsel stated:

> if any of you decided that David Gore...was guilty of first-degree murder because Freddy had done it and that was felony murder...I submit to you that these aggravating circumstances that Mr. Stone is arguing for, many of of them don't apply.

(R.3222-26). F.S.A. § 921.141(5)(h) and (i) list the two aggravating factors that Petitioner argued did not apply:

> (h) The capital felony was especially heinous, atrocious, or cruel.
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

12 The judge did point out that defense counsel could argue that the facts did not support finding that aggravating factor:

> I'll permit you to argue that the crime was not committed in a cold, calculated, way...and it's not an aggravating circumstance; but I will not permit you to argue that simply because Mr. Waterfield did the killing, that is not an aggravating circumstance.

(R.3225) [and in the same conversation the Court also stated]

> I think you can argue that the fact it may not be premeditated, the fact that somebody else did the shooting...

(R.3224).

States v. Trujillo, 714 F.2d 102 (11th Cir. 1983). Hence, the trial court did not deny Petitioner's Sixth, Eighth, or Fourteenth Amendment rights by restricting his closing argument.

Accordingly, this claim is DENIED.

VII

In his seventh claim, Petitioner asserts that his right to an impartial jury under the Sixth Amendment and the Florida Constitution was violated because the trial court allegedly prevented Petitioner's counsel from engaging in adequate voir dire examination of the jury panel. During voir dire, Petitioner's counsel sought to ascertain whether any juror possessed such a predisposition toward the death penalty that he or she would be unable to recommend life if Petitioner was found guilty of first degree murder. Defense counsel asked:

> Concerning the death penalty, is there someone here that feels so strongly in favor of the death penalty that you would never under any circumstances be able to recommend mercy in a case in which the defendant was convicted of first degree murder?

(R. 1595). The Court sustained the State's objection to that question on the grounds that "mercy" was not referred to in the death penalty statute.

Though sustaining the State's objection may have been incorrect under Florida law, the trial court's action did not

prejudice defendant's right to an impartial jury.[13] The Sixth Amendment limits the State's power to exclude jurors based on their views about capital punishment. However, a juror may be excluded for cause if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526 (1980). Indeed, "[t]he State may insist...that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Id. See also Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844 (1985). The record here clearly shows that the Court inquired of the prospective jurors whether they had any bias or prejudice which could prevent them from being impartial or from following the Court's instructions. (R.1497-1502). Although the trial court did not allow defense counsel to use the term "mercy," the court did not foreclose counsel from asking jurors whether, given a guilty verdict, "they cannot render an advisory opinion back to this Court with reference to life

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13 The Supreme Court of Florida decided in Petitioner's appeal that pursuant to Florida law defense counsel should have been permitted to ask the jurors whether they could have recommended mercy. *Gore v. State,* 475 So.2d 1205, 1207 (Fla. 1985). However, the Court also found that the trial court's sustaining the state's objection "was harmless error beyond a reasonable doubt." *Id.* There was no showing of prejudice to the defendant because

> The jury was thoroughly questioned in regard to their attitudes toward the death penalty and whether they felt it should be automatically imposed or whether they would follow the court's instructions and make sure the circumstances were proved to support it before they would consider it.

imprisonment not to exceed twenty-five years." (R.1596).[14] Overall, the record demonstrates that the subject of predisposition in favor of the death penalty was adequately addressed and that Petitioner's Sixth Amendment right to an impartial jury and an adequate voir dire were not violated. Both the judge as well as counsel for both sides took great pains to ascertain whether the jury could fulfill its duty abide by the law and render an impartial verdict and sentence.

Accordingly, this claim is DENIED.

VIII

Petitioner's eighth claim concerns two incidents during which the trial court allegedly prevented defense counsel from presenting exculpatory testimony. In reviewing both instances, the Court does not find the Petitioner's Sixth Amendment right to confront witnesses or present evidence was violated.

First, Petitioner asserts that the trial court violated his right to present witnesses when it barred defense counsel from presenting a witness to impeach the testimony of

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14 At the conclusion of the bench conference following the objection to the use of the term "mercy," the Court told the jury:

> The bottom line is that you would follow the instructions of the law that will govern this case, and with that law and the evidence base your decision only on the law and the evidence.
>
> In other words, is there anyone that would not follow the law in this case. I know the reservations that some of you have about the capital death penalty, and we're going to get into that, but with those reservations, is there anyone that would not follow the Florida law that governs this case and that you would be instructed by me as the judge in this case with the reservations of those individuals as to capital punishment?

(R.1596-97).

Michael Rock. Mr. Rock testified that he saw Petitioner shoot the victim. Defense counsel asked Mr. Rock in his cross examination whether Rock recalled "telling Detective Pisani that you couldn't see his face?" To which Rock replied, "Well I told him I couldn't see his whole face, but part. I only saw part of it, but I told him I didn't see his whole face." (R.1994-95). Defense counsel then sought to impeach Mr. Rock by having Detective Pisani testify: "I asked [Rock] did he have a mustache and I said 'Do you know?' Rock responds, "I really couldn't see his face 'cause he kind of held it down." The trial court barred this testimony pursuant to Florida Rule of Evidence § 90.614(2) because defense counsel had failed to lay a proper predicate for the introduction of impeachment testimony. (R.2660-64).

Florida Rule of Evidence § 90.614(2) requires:

> Extrinisic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it...

The Court agrees with the State that defense counsel could very easily have asked Rock if he had told Detective Pisani "I really couldn't see his face cause he held it down." Here, defense counsel did not fully and accurately quote the prior, allegedly inconsistent statement to the witness during cross examination and did not fulfill the prerequisite of the rule for subsequent presentation of the impeachment testimony. Moreover, the statement made by the witness during cross examination was not materially different from the earlier statement in the sense that the witness admitted that his view of the Petitioner's face was impaired.

Second, defense counsel sought to introduce exculpatory statements allegedly made by Willie Webb who lived next

door to the place where the victim was shot. The statements were made to Dorothy Stokes. Webb is alleged to have said that he heard a scream and shots, then immediately saw Waterfield come around the corner in his truck, jump out and run into Webb's yard with a gun in his waistband. The trial court refused to let Ms. Stokes testify to Webb's statements on the basis that the statements did not qualify as an excited utterance exception to the hearsay rule. This was nothing more than an evidentiary ruling which was not clearly wrong, and the Court does not find any constitutional infirmity in that ruling.

Accordingly, this claim is DENIED.

IX

In his ninth claim, Petitioner argues that his sentence must be overturned because the court allowed the State to introduce evidence of non-statutory aggravating factors at Petitioner's capital sentencing proceeding.

Four months prior to his conviction in this case, Petitioner had been serving a prison sentence for an earlier conviction of the offense of armed trespass. This conviction was based on Petitioner's entering into a woman's car and hiding in the back seat with a loaded .357 magnum and a pair of handcuffs. Petitioner's prior imprisonment was made known to the jury. However, the jury was not told the reason for that imprisonment. (R.3070-3073). The trial court had previously ruled that armed trespass did not qualify as an aggravating circumstance.

The first reference to the trespass later arose when Petitioner's mother testified about Petitioner's character and his religious conversion while he was in prison on the prior charge. This effectively "opened the door" and, on cross examination, the State questioned Petitioner's mother

about the circumstances of the trespass since she had testified that Petitioner was "not capable of doing this" and that she had "never worried from day one until now" that her son would get into such trouble. Petitioner's mother admitted that he had been sent to prison for crouching in the back of a woman's car with a gun and handcuffs. (R.3154-55). The State later referred to this incident in its closing argument when it questioned whether Petitioner's alleged religious conversion was sincere in light of his past behavior. (R.3213).

Petitioner contends that the two references to the armed trespass unlawfully introduced the aggravating circumstance of a prior conviction of a felony involving the use or threat of violence. F.S.A. 921.141(5)(b).

The references to the circumstances surrounding the armed trespass do not qualify as error, much less constitutional error. The State never argued that this prior incident constituted an aggravating circumstance. Rather, the prosecutor told the jury:

> I submit to you that was a response to a comment about the character of the defendant in this case. What happened after he got out of prison and had been born again the first time? [referring to the murder] Within four months — within four months after he had been born again in prison and got out, that's what happened.
>
> I submit to you that you can consider that in determining whether or not the defendant's character is an aspect in mitigation of the aggravating circumstances that have been proven here beyond a reasonable doubt.

R. 3215-16. Hence, the references to the circumstances of the trespass simply addressed the issue of Petitioner's character in rebuttal of his argument that he had undergone

a religious conversion. Moreover, the jury was instructed that it could consider only five aggravating circumstances. Those five did not include a prior felony involving threat or use of violence.

Accordingly, this claim is DENIED.

X

Petitioner's tenth claim is that he was deprived of reliable and individualized sentencing procedure. Here, Petitioner argues that the judge imposed sentence after the jury's verdict without mentioning any statutory or nonstatutory mitigating circumstances, and that the trial court had not engaged in the required balancing process. Instead, Petitioner contends that the trial court sought after the fact to bolster its sentence by providing written findings which in part varied from the trial court's oral comments at sentencing.

Petitioner's claim is procedurally barred due to his failure to argue it on appeal. Petitioner has not demonstrated sufficient cause for his failure to raise the issue on appeal nor has he demonstrated any actual prejudice. Even if the claim were not barred, the trial court's action in sentencing the Petitioner and its later submission of written findings supporting that sentence does not raise a constitutional issue. It is clear that the trial court made a considered judgment in imposing the death penalty. The judge referred to the jury's 11-1 vote in favor of death, and identified several aggravating circumstances in imposing the sentence. Moreover, the basis of the sentence was thoroughly discussed and supported by specific findings which the Court later submitted as required by Florida statute § 921.141(3).

Petitioner's allegation of prejudice and an unreliable sentence is without merit.

Accordingly, this claim is DENIED.

XI

Petitioner's eleventh claim is that he was denied a reliable sentencing proceeding in violation of *Booth v. Maryland,* 107 S.Ct. 2529 (1987), and the Eighth and Fourteenth Amendments, when the state urged that he be sentenced to death on the basis of impermissible "victim impact" evidence. Petitioner asserts that, contrary to the rule established in *Booth,* both the jury and the judge may have considered inappropriate victim impact evidence in arriving at their decisions to recommend and impose, respectively, the death penalty.

Booth involved a Maryland statute which required that a presentence report containing a "victim impact statement" be considered in all felony cases. The statement was designed to detail the effect that the crime had on the victim and his or her family. The Supreme Court held that the presentation of such information to a capital sentencing jury violates the Eighth Amendment because it creates a constitutionally unacceptable risk that the jury might impose the death penalty in an arbitrary and capricious manner. *Id.* at 2533.

The victim impact statement provided to the jury in *Booth* contained two types of information. It first described the personal characteristics of the victims and the emotional impact of the crimes on their family, and second, it set forth the family members' opinions and characterizations of the crimes and defendant. *Id.* Included in the impact statement presented to the jury were family members' comments regarding the serious emotional problems they suffered as

a result of the crimes, family members' perception of the crimes, including the victims' son's opinion that his parents had been "butchered like animals," and the family members' beliefs that the defendants could "never be rehabilitated." *Id.* at 2531.

In noting that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion,'" *Id.* at 2536 *quoting Gardner v. Florida,* 97 S.Ct 1197, 1204 (1977), the Court stated that there is no "justification for permittig such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *Booth,* 107 S.Ct.at 2534. Thus, the Court vacated Booth's death sentence because it concluded that the family members' opinions and characterizations of the crimes "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* at 2536.

Upon review of the record in this case, the Court concludes that a material difference exists between the detailed victim impact statements presented to the jury in *Booth* and the references made to the victim's family here. In this case during voir dire examination of the venire, the prosecutor, in the context of stressing that sympathy cannot play a role in the jury's deliberations, made reference to the fact that although members of the Petitioner's family might testify during the penalty phase (if the Petitioner were ultimately convicted), the parents of the victim would not be permitted to testify. Additionally, at the sentencing phase the prosecutor, in response to the introduction of childhood photographs of the Petitioner, made passing reference to the fact that he could not introduce similar photographs of the victim. Unlike the situation in *Booth,* there were no comments from family members regarding either their emotional problems, their perceptions of the crime, their beliefs

about the Petitioner, or the personal characteristics of the victim. Indeed, the prosecutor did not dwell on any impact the crime had on the victims or their families. His comments simply pointed out the self-evidence fact that these teenage victims did have families in the context of arguing that sympathy for any party, victim or Petitioner, should not enter into the jury's consideration. The Court, therefore, concludes that the prosecutor's statements did not create the risk that the Petitioner's death sentence was based on considerations that are "constitutionally impermissible or totally irrelevant to the capital sentencing process." *Id.* at 2533 (citations omitted).

Petitioner also contends that the trial judge considered inappropriate victim impact evidence when imposing sentence. Petitioner points out that when the judge orally imposed sentence, he mentioned the suffering and torture felt by the surviving victim, Regan Martin. These comments were discussed in the context of the statutory aggravating circumstances that the murder was committed while the Petitioner was engaged in committing other felonies — kidnapping and sexual battery — and that the murder was especially heinous, atrocious and cruel. These comments by the judge clearly fail to offer any support for Petitioner's *Booth* claim.

Accordingly, this claim is DENIED.

XII

Petitioner asserts that the trial court's instructions to the jury during the penalty phase of Petitioner's trial violated his constitutional rights by shifting the burden of proof from the State to him. The relevant instructions given by the trial court are as follows:

THE COURT: ...[I]t is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

* * * *

Now, should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

* * * *

Now, if one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

Now, a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

Now, the sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(R.3231-34).

Petitioner contends that these instructions impermissibly shifted the burden of proof to him in violation of *Mullaney v. Wilbur,* 421 U.S. 684 (1975) and violated his due process and Eighth Amendment rights to a fundamentally fair and reliable sentencing determination.

Petitioner's claims is without merit. The United States Supreme Court has previously declared Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances, to be constitutional on its face. *Id.* As the Supreme Court stated:

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 96 S.Ct. 2960, 2969 (1976). The instructions given by the trial court in this case track the language of the statute found facially constitutional in *Proffitt.* The statute as applied by the trial court in its instructions thus did not violate Petitioner's due process rights; and more specifically, did not shift the burden of proof to him.

Accordingly, this claim is DENIED.

XIII

Petitioner asserts that he was denied effective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments.

The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington,* 104 S.Ct. 2052, 2064 (1984). The basic standard for judging a claim that an attorney has not provided constitutionally adequate assistance is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* Accordingly, a petitioner seeking relief on a claim of ineffective assistance, such as the one presented here, has the burden of showing (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* Each of these requirements was explained further in *Strickland v. Washington* to involve the following considerations.

The criterion for evaluation of attorney performance is that of *reasonably* effective assistance. The standard of reasonableness is an objective one which may be measured by using prevailing professional norms as guidelines; however, a court must be highly deferential when evaluating the performance of defense counsel and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 2065-66. Every effort should be made "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 2065. Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 2066. Further, the Court of Appeals has reiterated that effective assistance does not mean errorless assistance, and that an attorney's performance is to be judged on the totality of circumstances in the entire record rather than on specific actions. *Green v. Zant,* 738 F.2d 1529, 1536 (11th Cir.), *cert. denied* 105 S.Ct. 67 (1984).

Even if defense counsel's performance was deficient, a petitioner asserting a claim of ineffective assistance must show that the deficiencies were prejudicial to his defense. This requires "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 104 S.Ct. at 2068.

In this case, Petitioner asserts that his trial counsel rendered ineffective assistance because he failed to present evidence concerning, and to request an instruction on, the issue of Petitioner's voluntary intoxication which, if proven to the jury, would have negated the specific intent necessary to convict Petitioner of the crimes with which he was charged. At the Petititioner's Rule 3.850 hearing in state court Mr. Kendall Phillips, Petitioner's trial counsel, testified that he and co-counsel James Long investigated and considered presenting a defense based on Petitioner's intoxication but ultimately rejected pursuing such a strategy. (EH 658, 661, 668). Mr. Phillips testified that the intoxication defense was rejected both because it was factually very weak and because he thought it would be inconsistent with Petitioner's main defense, factual innocence based on misidentification.[15] Mr. Phillips stated that he thought he would lose credibility with the jury if he were to present both defenses. (EH 658).

Upon review of the record the Court cannot say that by failing to pursue an intoxication defense, counsels' performance fell outside the range of professionally competent assistance. As counsel pointed out during his testimony, the

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15 Mr. Long gave similar testimony at the state Rule 3.850 hearing, stating that counsel had spent many hours talking with Petitioner's family about his history and that counsel rejected presenting an intoxication defense because they believed the identity defense was stronger. (EH. 567, 601).

intoxication defense was weak as there was no direct evidence that Petitioner had been drinking or using drugs on the day of the offense.[16] To be sure, as discussed with respect to claim I, there was some circumstantial evidence — the bottle of vodka, the opened bottle of pills and family members' impressions — that would lend credence to an intoxication theory. However, there was also evidence from law enforcement personnel that after his arrest the Petitioner did not appear to be under the influence of either alcohol or drugs. (R.2504, Testimony of Detective Sidney DuBose). Additionally, although Petitioner is correct that the misidentification and intoxication defenses are not strictly inconsistent, counsel's belief that he would lose credibility with the jury if he were to argue both that his client was innocent but that, if he were guilty, his guilt should be at least partially excused, is not unreasonable and strategic choice not to pursue both defenses does not render his assistance ineffective.

Further, even if the Court concluded that competent counsel would have pursued an intoxication defense, the Petitioner's claim of ineffective assistance would still be unavailing because he has failed to demonstrate that there is a reasonable probability that assertion of the defense would have changed the outcome of the case. *See Strickland,* 104 S.Ct. at 2068; *Harich v. Dugger,* 844 F.2d 1464, 1471 (11th Cir. 1988). Not only was there no direct evidence of intoxication but the circumstantial evidence was not extremely strong and the inference of intoxication Petitioner hoped to draw from it was disputed by the observations of law enforcement personnel. Further, as described by Regan

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16 Petitioner did not testify at either the guilt phase or the sentencing phase and no allegation is made that the decision to keep him off the witness stand was erroneous or constituted ineffective assistance of counsel and, from the record, no such claim could be sustained.

Martin, the surviving victim, the Petitioner's course of conduct over the hours the kidnappings, sexual assaults and murder took place disclosed that he directed the commission of the offenses. This testimony would have directly contradicted Petitioner's claim that he was so intoxicated that he was unable to form the specific intent necessary to be found guilty of the crimes charged. Petitioner, therefore, has failed to meet his burden of demonstrating that he was constitutionally prejudiced by counsel's failure to pursue an intoxication defense.

Accordingly, this claim is DENIED.

XIV

Petitioner asserts that he was deprived of his due process rights, his right to a fair trial and his right to confrontation in violation of the Sixth, Eighth and Fourteenth Amendments due to the State's failure to comply with state discovery rules. Petitioner alleges that the State failed to comply with state discovery rule 3.220(a)(1)(vi), Fla. R. Crim. P., because it did not list the fact that three rounds of ammunition were found in Petitioner's pants pocket. Petitioner claims that this omission prejudiced him when the State improperly introduced the ammunition into evidence over his objection.

This claim is without merit. An alleged violation of state law is cognizable in a § 2254 petition only if some federal right has also been impinged. Petitioner has shown no such federal right was violated in this case. Petitioner had been given notice of the presence of the ammunition well prior to trial because its existence was noted during the deposition testimony of Mr. Daniel Nippes, criminalist with the regional crime laboratory. (R.2467-68). Additionally, the evidence was available for inspection by counsel for some time prior to trial. (R.2472). The Court, therefore, cannot say

that Petitioner's due process rights, his rights to a fair trial or his right to confrontation were compromised by the State's failure to list the ammunition as may be required by state rules.

Accordingly, this claim is DENIED.

XV

Petitioner's fifteenth claim for relief is predicated upon *Caldwell v. Mississippi,* 105 S.Ct. 2633 (1985), in which the Supreme Court held that it is constitutionally impermissible under the Eighth and Fourteenth Amendments for a state to rest a death sentence on a determination made by a sentencing jury which has been led to believe that ultimate responsibility for determining the appropriateness of the defendant's death rested elsewhere. As this claim was not raised at trial or on direct appeal, it is procedurally barred. The Court can review the merits of the *Caldwell* claim only if the Petitioner can demonstrate sufficient cause and prejudice to excuse his failure to raise this issue on appeal. *Wainwright v. Sykes,* 433 U.S. 72 (1977). Petitioner is foreclosed from showing the requisite "cause," however by the Supreme Court's recent decision in *Dugger v. Adams,* 3 FLW Fed. 5105 (February 28, 1989). Adams held that the Court's intervening decision in *Caldwell* does not provide cause to a Florida defendant for a procedural default because the claims could have been raised during trial under then existing state law. As the Supreme Court explained in *Adams:*

> [W]hat is determinative in this case is that the ground for challenging the trial judge's instructions — that they were objectionable under state law — was a necessary element of the subsequently available *Caldwell* claim. In such a case,

> the subsequently available federal claim does not excuse the procedural default.

Id., slip op. at 9. Petitioner's *Caldwell* claim is thus procedurally defaulted and the default is not excused under the cause and prejudice standard set out in *Sykes.*

Accordingly, this claim is DENIED.

XVI

Petitioner contends that his death sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of *Lowenfield v. Phelps,* 108 S.Ct. 546 (1988), and the Eighth and Fourteenth Amendments. More particularly, the Petitioner contends that it is unclear from the general verdict form whether the conviction was for killing with a premeditated design pursuant to Fla. Stat. 782.04(1)(a)(1) or pursuant to the felony murder provision at Fla. Stat. § 782.04(1)(a)(2). The Petitioner argues that if the jury rendered a verdict of guilty of murder in the first degree on the basis of the felony murder statute, then a finding of the aggravating factor set forth in Fla. Stat. § 921.141(5)(d) (that the crime for which the defendant is (sic) be sentenced was committed while the defendant was engaged in the commission of, *inter alia,* sexual battery or kidnapping) was "automatic" at the penalty phase in violation of *Lowenfield.* This argument is without merit.

In *Lowenfield,* the petitioner was found guilty of three counts of first degree murder pursuant to a Louisiana statute which defined the crime as occurring when: "[T]he offender has a specific intent to kill or to inflict great bodily harm upon more than one person." *Id.* at 554 *quoting* La.Rev.Stat.Ann § 14:30.A(3). The only aggravating factor found by the jury was that "the offender knowingly created a risk of death or great bodily harm to more than one

person." *Id. quoting* La.CodeCrim.Proc.Ann.Art. 905.4(d). Petitioner contended that his death sentence violated the Eighth Amendment because the sole aggravating factor found merely duplicated an element of the underlying offense of which he was convicted. *Id.* at 548.

In rejecting the petitioner's contention the Supreme Court held that the parallel nature of the aggravating circumstance did not render the sentence infirm because the constitutionally mandated narrowing of the class of death-eligible persons was performed at the guilt phase under Louisiana's statutory scheme. The Constitution, therefore, did not require an additional aggravating circumstance to be found at the penalty phase to channel the jury's discretion. *Id.* at 554.

In Florida, unlike Louisiana, the required narrowing of death-eligible persons occurs during the sentencing phase through the weighing of aggravating and mitigating factors. Here, in the Order entered August 20, 1984, the trial judge specifically found the existence of five statutory aggravating circumstances and that no mitigating circumstances existed. (R. 854A-G, Order of Judge L.B. Vocelle, August 20, 1984). On appeal, the Florida Supreme Court rejected all of Petitioner's challenges to his sentence, including numerous challenges to individual aggravating circumstances, and held that the death penalty was proportionately warranted in this case. *Gore v. State,* 475 So.2d 1205, 1211 (Fla. 1985).

Based on the fact that the trial court found four aggravating circumstances independent of that claimed to be "automatic" by Petitioner, and the Court's own review of the record, there is no question that the penalty phase of this trial "genuinely narrow[ed] the class of persons eligible for the death penalty and...reasonably justif[ied] the imposition of more severe sentence on the defendant as compared to others found guilty of murder." *Zant v. Stephens,* 103 S.Ct.

2733, 2742 (1983). *Lowenfield v. Phelps,* adds nothing to the Petitioner's argument and simply does not support it.

Accordingly, this claim for relief is DENIED.

XVII

In his final claim Petitioner contends that he was denied the due process guarantees of an impartial jury and a verdict based solely on the evidence adduced at trial in violation of the Sixth, Eighth, and Fourteenth Amendments due to an outburst by an epileptic juror which interrupted defense counsel's closing argument. At the time, defense counsel reported to the trial judge that he had heard the juror laughingly exclaim during his seizure "goddam you" two or three times. (R.2856-7). After taking a brief recess during which the trial judge denied Petitioner's motion for mistrial, the epileptic juror was excused and an alternate juror seated in his place. The judge then gave the following explanatory and curative instruction:

> **THE COURT:** Ladies and gentlemen of the jury, we are concerned about Mr. Brown's health. Under the circumstances I am excusing Mr. Brown so that he can go about his own personal affairs and I believe we do have someone in attendance with him.
>
> * * * *
>
> Ladies and gentlemen, any outburst that Mr. Brown made or may not have made — I did not hear — but I want to state to you, as I've stated to you from the very beginning, this case must be tried solely on the evidence on the law and nothing else.
>
> * * * *

> Can each of you assure me that you will make your decision in this case solely on the law and nothing else?
>
> Is there anything that Mr. Brown has stated that would in any way influence this jury and carry any comments he may or may not have said into the jury room?
>
> All right. We're sorry for the interruption of the defense's argument. Mr. Phillips, you may proceed.

(R.2864-66).

Upon review of the record, the Court concludes that the brief and unfortunate outburst by the epileptic juror in the throes of a seizure did not undermine "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana,* 85 S.Ct. 546, 549 (1965). The juror was excused and any potential confusion felt by the jury after the jurors's outbrust was adequately remedied by the curative instruction given by the trial court immediately following the brief recess which had been taken in order to give the affected juror medical assistance.

Accordingly, this claim for relief is DENIED.

Upon due consideration, the Court has concluded that Petitioner's first claim for relief, the claim based on *Lockett v. Ohio,* and *Hitchcock v. Dugger,* is meritorious and that Petitioner has demonstrated that his death sentence was imposed in violation of the Eighth Amendment of the Constitution of the United States.

The petition for a writ of habeas corpus is GRANTED. Unless the State within 120 days resentences the Petitioner in a proceeding that comports with *Lockett* and *Hitchcock,* the Petitioner shall be resentenced to an appropriate

sentence less than death. With respect to all other claims, the petition is without merit and is denied.

A number of motions remain for the Court's consideration. Petitioner's motion for leave to proceed *in forma pauperis* is GRANTED. The motion for an extension of the Court's page limitation is GRANTED. The several motions to admit counsel pro hac vice are GRANTED.

The Clerk is directed to enter judgment in favor of Petitioner consistent with this memorandum opinion.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 17th day of August, 1989.

/s/_____
UNITED STATES DISTRICT JUDGE

DAVID ALAN GORE,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent.

DAVID ALAN GORE,
Appellant,

v.

STATE of Florida,
Appellee.

Nos. 72202, 72300

Supreme Court of Florida.

August 18, 1988

Rehearing Denied Nov. 23. 1988.

Defendant was convicted of first-degree murder, kidnapping, and three counts of sexual battery. The Circuit Court, Pinellas County, L.B. Vocelle, J., denied defendant's motion for postconviction relief. Defendant appealed the denial of that motion and petitioned for writ of habeas corpus. The Supreme Court held that defendant was not deprived of opportunity of presenting pertinent nonstatutory

mitigating evidence during penalty phase of trial by omissions of counsel.

Order denying postconviction relief affirmed; petition for habeas corpus denied.

Larry Helm Spalding, Capital Collateral Representative and Billy H. Nolas and Judith J. Dougherty, Office of the Capital Collateral Representative, Tallahassee, and Jerome H. Nickerson, Wheaton, Md., for petitioner-appellant.

Robert A. Butterworth, Atty. Gen., and Robert S. Jaegers, Georgina Jimenez-Orosa and Carolyn V. McCann, Asst. Attys. Gen., West Palm Beach, for respondent-appellee.

PER CURIAM.

This is a petition of David Alan Gore for a writ of habeas corpus seeking to set aside his death sentence and an appeal from the denial of a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, §§ 3(b)(1),(9), Fla. Const. In order to give adequate consideration to the issues involved, this Court stayed Gore's impending execution. We now conclude that Gore is entitled to no relief.

Gore was convicted of the first-degree murder of Lynn Elliott, the kidnapping of Elliott, the kidnapping of Regan Martin, and three counts of the sexual battery of Regan Martin. Following a jury recommendation of death, the trial judge imposed the death sentence for the murder of Elliott and life sentences for the other crimes. This Court affirmed in *Gore v. State,* 475 So.2d 1205 (Fla. 1985), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986).

The crimes were described in our opinion as follows:

> Gore and his cousin picked up fourteen-year-old Regan Martin and seventeen-year-old Lynn

Elliott who were hitchhiking to the beach. After the glove compartment in the pickup truck fell open and a gun became visible, Gore took the gun and held it to Regan's head. He grabbed the two girls' wrists and held them together. Gore then said that they should take the girls to Gore's home. He told the girls that if they said or did anything, they would be killed. When they arrived at his home, the girls were handcuffed and taken into a bedroom. The girls then were separated, and Lynn was tied up while Regan was handcuffed. Gore cut Regan's clothes off of her and sexually assaulted her on three separate occasions. Regan testified that she heard noises in the other room after Gore had left her. She heard Gore tell Lynn to shut up or he would kill her. Gore also told Regan to be quiet or he would slit her throat and that he would do it anyway. Gore then put Regan in the closet, and, after he left, she heard two or three shots. Gore then came back into the room and put Regan in the attic where she stayed until rescued by a police officer.

Michael Rock, a fifteen-year-old boy, testified that on July 26, 1983, while riding his bicycle in the area of Gore's home, he heard screaming and observed a naked girl running down the driveway being chased by Gore who was also naked. He saw Gore catch up to her, drag her back to a palm tree, and shoot her twice in the head. Rock went home and told his mother, and she called the police. The police arrived and surrounded Gore's home. Lynn's body was found in the trunk of the car in the driveway. Her arms and legs had been tightly bound with rope. She had multiple abrasions on her body consistent with falling and being

dragged. The gun used to kill her was found in Gore's home.

Id. at 1206.

Gore raises a number of points, but we only find it necessary to discuss one of them. In both his petition and his appeal, Gore claims that because of omissions of counsel, he was deprived of the opportunity of presenting pertinent nonstatutory mitigating evidence during the penalty phase of his trial.

At the charge conference which preceded the testimony at the penalty phase, Gore's counsel said that he planned to have Gore's brother-in-law testify that Gore was acting strangely the weekend before the killing and that after the crime he had found a half empty bottle of vodka and some pills in Gore's bedroom. He intended for this witness and Gore's mother and father to say that because of the way he was acting, they believed that he was drinking. The judge deemed this irrelevant because there was no evidence that Gore was drinking while the women were in his custody, and Martin testified that he did not appear drunk. At the postconviction hearing, Gore's father, uncle and brother-in-law testified that Gore was usually quiet, but when he drank his personality changed and he would become very talkative. The brother-in-law said that when he had had dinner with Gore the night before the murder, Gore was at first talkative but later became quiet and appeared nervous. He said that Gore did not take a drink in his presence. Gore's uncle said that Gore seemed to be acting strangely the night before the crime.

From an examination of the record, it appears that to the extent that evidence was available concerning the possibility of drinking, Gore's trial counsel sought to have it introduced. The trial judge sustained the state's objection based on relevancy. Hence, trial counsel cannot be faulted

for failing to present the evidence. On appeal, Gore's appellate counsel asserted in point XVIII of the brief that the judge had erred in refusing to permit evidence concerning the possibility of drinking. While this issue is not specifically mentioned in the opinion, this Court denied all of Gore's assertions. Hence, it is evident that neither counsel was ineffective.

In the penalty phase of the trial, Gore's attorney also sought to have Gore's mother testify concerning the close relationship between her son and his cousin, Freddie Waterfield, who accompanied Gore when they picked up Elliott and Martin on the highway. Gore's mother was prepared to say that they had been close friends most of their lives and that because of Waterfield's dominating personality, he had a strong influence on Gore's conduct. The trial judge sustained the state's objection to this testimony on grounds of relevancy. At the postconviction hearing, other relatives also testified of Waterfield's influence upon Gore.

It is likewise clear that Gore's trial counsel tried to introduce evidence on the subject of Waterfield's dominance during the penalty phase but was prevented from doing so by the ruling of the trial court. Under these circumstances, there was nothing more that trial counsel could do. The state suggests that appellate counsel also asserted this ruling as error in the appeal. While it is true that there is an oblique reference to the subject in Gore's appellate brief, it cannot be fairly said that this issue was squarely raised on appeal. Hence, it is necessary to further consider the claim of ineffectiveness directed toward appellate counsel on this issue.

It is evident that the reason the trial judge would not permit testimony concerning the influence of Waterfield upon Gore was because there was no evidence that Waterfield had anything to do with Gore's killing of Elliott. According to the testimony of the surviving victim, Martin,

it was Gore who took the gun out of the glove compartment of the truck, put it to her head and then grabbed her wrist along with Elliott's wrist and held them together. Martin further testified that it was Gore who suggested that Waterfield drive them home "to have a little fun with them," that Gore threatened to kill them, handcuffed their wrists together, and did all the talking and gave the orders. Gore was the only person she ever saw holding the gun and the one who sexually assaulted her. She said she was pretty sure that Waterfield had left when they were brought to the house. She did not see Waterfield or anyone else besides Gore in the house and only heard Gore's voice after they were brought inside. Michael Rock, the eyewitness to the shooting, said that the man who chased Elliott and killed her was Gore. Thus, even if it were shown that Waterfield had the ability to influence Gore, the evidence would not have supported the statutory mitigating circumstance of substantial domination of another person. *See Hill v. State,* 515 So.2d 176 (Fla. 1987), *cert. denied,* ___ U.S. ___, 108 S.Ct. 1302, 99 L.Ed.2d 512. (1988).

Gore argues, however, that the testimony was admissible as nonstatutory mitigating evidence pertaining to an aspect of his character. Thus in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court held that "the sentencer...[must not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S.Ct. at 2964-65 (emphasis in original) (footnote omitted). While the evidence in question had minimal relevance to the offense, we cannot say that it was totally unrelated to his character. Gore should have been permitted to introduce such evidence for whatever weight it might be given. Therefore, it becomes necessary to evaluate the claim of ineffectiveness of counsel by applying the two-prong test

of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this respect, we find it unnecessary to decide whether appellate counsel was ineffective for not making the argument on appeal because we are convinced that Gore has failed to show the requisite prejudice resulting from the alleged substandard performance. In evaluating the ineffectiveness of counsel as it relates to an attack on a death sentence, the United States Supreme Court in *Strickland* said:

> When a defendant challenges a death sentence...the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstanes did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been...affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision

reached would reasonably likely have been different absent the errors.

466 U.S. at 695-96, 104 S.Ct. at 2068-69.

Measured by this criteria, we cannot say that if the witnesses had been permitted to testify of Waterfield's influence over Gore that there is a reasonable probability that he would have received a life sentence rather than death. Recognizing that Waterfield played no part in this brutal killing and that there were five aggravating circumstances and no mitigating circumstances, the omission of this evidence would not have affected the outcome of this case.

We affirm the order denying postconviction relief, and we deny the petition for habeas corpus. We also vacate the stay of execution, although the prior death warrant has now expired.

It is so ordered.

ENRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

OCTOBER TERM, 1991

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 91-669

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

DAVID ALAN GORE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Attorney General's petition states that the State is neither seeking certiorari review in this case because the Eleventh Circuit applied the law incorrectly, nor because the result reached by the Court of Appeals was wrong. See e.g., Petition for Writ of Certiorari, p. 13 ("Petitioner does not seek certiorari review because the Eleventh Circuit reached the wrong result in this particular case..."). The panel of the Court of Appeals was comprised of Chief Judge Tjoflat, Judge Fay, and Judge Johnson. The full Court denied the State's petition for in banc review on July 23, 1991, with no member of the Court suggesting that the panel's decision should be reviewed. See Gore v. Dugger, No. 89-4026 (11th Cir. July 23, 1991) (Order denying petition for rehearing in banc).

What the Petitioner does say is that certiorari review should be granted because of an alleged "intracircuit" conflict in the Eleventh Circuit. However, as this response discusses, this case presents no controversy suggesting that the State's petition should be granted. A review of the decisions of the Court of Appeals, particularly the opinions authored by the Judges who presided in Mr. Gore's case, and consideration of the effect of the constitutional error "under the circumstances of this particular trial," Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991), so demonstrates. And such consideration demonstrates the manifest inaccuracy in the "Question" presented by the Petitioner in this case: contrary to the State's suggestion that the Court of Appeals refused to address the harmless error issue

because "any attempt to 'wrestle' with the issue would only result in further conflict" (petition, pp. i and 7), the Court of Appeals' ruling was that "[t]his panel unanimously agrees that under the circumstances of this particular trial" the error could not be deemed harmless. Gore, 933 F.2d at 905. The ruling was based on the panel's unanimous agreement that the error was not harmless in this case under any standard. This response discusses the propriety of the Court of Appeals' ruling, the fact that the Court's unanimous decision involves no controversy warranting the granting of the State's petition, and the fact that there is no conflict which is in any way relevant to the disposition of this case in the precedents of the Eleventh Circuit Court of Appeals.

TABLE OF CONTENTS

Page

INTRODUCTION. i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE. 1

A. Preliminary Statement. 1

B. The Mitigation. 2

1. Alcohol and Drug Use Evidence 2

2. Codefendant Domination 34

3. The Parties' Positions Below 45

C. This Court's Standard of Review and Its Application in the Eleventh Circuit 46

ARGUMENT 48

THIS CASE PRESENTS NO CONTROVERSY WARRANTING THE GRANTING OF THE STATE'S PETITION

CONCLUSION 60

CERTIFICATE OF SERVICE 61

TABLE OF AUTHORITIES

Page

Amazon v. State,
487 So. 2d 8 (Fla. 1986). 32

Barbera v. State,
505 So. 2d 413 (Fla. 1987). 32

Booker v. Dugger,
922 F.2d 633 (11th Cir. 1991),
cert. denied, 111 S.Ct. ___ (1991) 47,48,50,56

Chapman v. California,
386 U.S. 18 (1967). 46,passim

Clark v. Dugger,
834 F.2d 1561 (11th Cir. 1987),
cert. denied, 485 U.S. 982 (1988) 47,passim

Delap v. Dugger,
890 F.2d 285 (11th Cir. 1989),
cert. denied, 110 S.Ct. 2628 (1990) 47,48,58,60

Demps v. Dugger,
874 F.2d 1385 (11th Cir. 1989),
cert. denied, 110 S.Ct. 1834 (1990) 47,passim

Eddings v. Oklahoma,
455 U.S. 104 (1982) 33

Fead v. State,
512 So. 2d 176 (Fla. 1987). 31

Gore v. Dugger,
933 F.2d 904 (11th Cir. 1991) . . . . . i,passim

Gore v. Dugger,
No. 89-4026 (11th Cir. July 23, 1991) i,51

Gore v. Dugger,
763 F.Supp. 1110 (M.D.Fla. 1989) 50

Gore v. Dugger,
532 So.2d 1048 (Fla. 1988). 49

Gore v. State,
475 So.2d 1205 (Fla. 1985) 48

Hall v. State,
541 So.2d 1125 (Fla. 1989). 49

Hargrave v. Dugger,
832 F.2d 1528 (11th Cir. 1987) (in banc) 32

Hitchcock v. Dugger,
481 U.S. 393 (1987) 1,passim

Huddleston v. State,
475 So. 2d 204 (Fla. 1985). 32

Jackson v. Dugger,
931 F.2d 712 (11th Cir. 1991),
cert. denied, 111 S.Ct. ___ (1991) 47,passim

Jones v. Dugger,
867 F.2d 1277 (11th Cir. 1989) 53,passim

Lockett v. Ohio,
438 U.S. 586 (1978) 1,passim

Riley v. Wainwright,
517 So. 2d 656 (Fla. 1987). 34

Ross v. State,
474 So. 2d 1170 (Fla. 1985) 32

Satterwhite v. Texas,
486 U.S. 249, 108 S. Ct. 1792 (1988) 46,48,49,55

Skipper v. South Carolina,
476 U.S. 1 (1976) 46,48,49,55

Tafero v. Dugger,
873 F.2d 249 (11th Cir. 1989),
cert. denied, 110 S.Ct. 1834 (1990) 47,56,57,58

Waterhouse v. Dugger,
522 So. 2d 341 (Fla. 1988). 31

OPINIONS BELOW

The Respondent agrees with the Petitioner's statement.

JURISDICTION

The Respondent agrees with the Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Preliminary Statement

The Petitioner presented a general summary of the procedural history of this case at pages 3-6 of the petition. The summary, however, does not relate the significant nature of the mitigation involved in this case. Both the District Court and Court of Appeals found the evidence to be credible, reliable, and of a mitigating nature. Neither the veracity of the evidence nor its mitigating nature were challenged by the State before the District Court or Court of Appeals. The state trial court, however, on the basis of an objection presented by the trial prosecutor did not allow defense counsel to present it and thus precluded the jury from hearing it. This ruling was rendered notwithstanding the fact that the evidence plainly related to the background of the offender and the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). The District Court and Court of Appeals each found that the eighth amendment error could not be deemed harmless beyond a reasonable doubt. The full Court of Appeals

thereafter denied the State's petition for in banc rehearing with no member of the Court suggesting that the panel's ruling should be reconsidered.

In order to put this case in an appropriate perspective, and complementing the discussion presented in the argument section of this petition, the Respondent discusses below the mitigating evidence at issue and the state trial court's ruling -- a ruling which the District Court, Court of Appeals, the Petitioner (see Petition, p. 13) and the Respondent all agree was constitutionally erroneous. Thereafter, in its substantive argument, this response discusses the propriety of the ruling of the Court of Appeals and the fact that no conflict, question, or other ground warranting the granting of the State's petition is involved in this case.

B. The Mitigation

1. Alcohol and Drug Use Evidence

Prior to the presentation of evidence in the penalty phase, the judge sustained the State's objection to defense counsel's submission of evidence relating to Mr. Gore's alcohol/drug use on the day of the incident (R. 3047-56). Counsel indicated that Mr. Gore's brother-in-law, Bill Bowling, would testify "to the way David was acting.... He'll testify about some things he found in the house.... [A] half-empty bottle of vodka and a bunch of pills strewn around and a receipt for the bottle of vodka.... [T]hey'll testify because of the way he was acting, they believe he was drinking" (R. 3047-48). Family members and friends would have testified to the evidence of drinking and drug use and the

effects of the intoxication on Mr. Gore at times approximate to the offense. The trial court's response was:

> THE COURT: What's the relevancy of that? What's the issue of mitigation there? What's that in mitigation of?
>
> MR. LONG [DEFENSE COUNSEL]: It showed -- they'll testify because of the way he was acting, they believe he was drinking.
>
> THE COURT: That's not at issue. That's not a mitigating issue at all.

(R. 3048) (emphasis added).[1]

> THE COURT: I can't conceive of how it becomes relevant. That's not an issue in the case, is it, the fact that he had been drinking?
>
> MR. STONE [THE PROSECUTOR]: No, sir.
>
> MR. LONG: It is for mitigation, your Honor.
>
> THE COURT: The fact that he had been drinking?
>
> MR. LONG: No, your Honor.
>
> MR. MIDELIS [THE OTHER PROSECUTOR]: That would --
>
> MR. STONE: It would have been something that should have been brought up in the guilt or innocence phase to go to the matter of intent.
>
> MR. LONG: That's ridiculous because anything can be used by this jury as a mitigating circumstance. Anything.

(R. 3050). The trial court did not allow counsel to present the evidence (R. 3052).

In his pretrial deposition, Mr. Bowling had stated:

---

[1] "R." refers to the record on direct appeal to the Florida Supreme Court of the proceedings resulting in Respondent's death sentence. "PC" refers to the post-conviction record developed during proceedings in the state courts. These records, including the depositions and affidavits discussed herein, were submitted to and reviewed by the District Court and Court of Appeals.

Q: [H]ow well did you, uh, know, uh, David Gore?

A: Well, David's a--he's a funny sort of guy. He doesn't--if you talk to him he'll answer your questions and talk back to you but he's normally a very quiet person until he gets to drinking and when--Vodka's what he normally drinks with orange juice or straight, not to [sic] often straight but, um, when he drinks that he changes--his personality is totally different. He's like--it's like he's real happy, uh, easygoing and he doesn't much care what he says or does then. Whereas normally he's kind of, um, uh--I don't know what do you call it--what--he stays inside him-- introverted I guess you call it-- . . . . He's normally very introverted sort of person. All the time I've ever known him we--we used to go fishing and such together and he would hardly ever say anything. He would talk only whenever he had something he wanted to talk about or if he'd been drinking he'd talk your ears off.

Q: Well, when had you seen him drinking?

A: Oh, I'd say he normally drank around the house there when he first got his divorce from his wife, uh, Donna . . . . Uh, she kind of, uh, kept him pretty upset most of the time. Whenever I'd see him right--he'd come--he'd leave his house when they were married before the divorce and he'd come over to my in-laws house and, uh, he would maybe mix him up a drink or something of his father's, uh, Vodka and orange juice and he'd--he'd sit there and tap his foot 'cause when he got mad he always tapped his foot and he'd sit there and he'd talk to nobody or say nothing. He'd just sit there and keep it to himself . . . . Then, uh, he'd jump up all of a sudden go get in his car and go.

(Deposition of Bill Bowling, pp. 12-13).

Q: Totally changed? Would you almost say that and don't let me put words in your mouth, that it was, uh, uh, you know I wouldn't put words in anybody's mouth--strike that. Uh, would you almost say that, uh, it was a personality change once the alcohol got in his system?

A: Yeah, definitely.

(Id., pp. 15-16)(emphasis added).

Defense counsel also would have introduced the testimony of other witnesses and family members to demonstrate alcohol abuse,

alcoholism, and drug and alcohol use at the time of the crime. These witnesses would have substantiated the history of Mr. Gore's alcohol and drug dependency as well as his intoxication on the day of the offense:

> After the police were through searching my in-law's house, I found a gallon of vodka in David's room that was half empty. I also found a receipt from Lenny's Lounge for the vodka which indicated that it had been bought the day before David had been arrested. I also found a bunch of pills laying around the dresser in David's room. I think they were amphetamines.
>
> . . . .
>
> The only time I ever saw David really talk was when he was drinking. He would have just one drink and five or ten minutes later he was a completely different person. When David wasn't drinking, he would answer questions with just a "yes" or "no," and would never begin a conversation himself. When he's had a drink, he would be talking your ear off. He was more aggressive when he was drunk, and he would act in bizarre ways and do crazy things. When he was drinking he wouldn't even ccnsider what the results of his actions might be.
>
> Because I know David so well and have known him for so long, I knew he was drunk the day he was arrested and talked to the deputies. The only time he would talk loosely like that was when he was drunk. I didn't need to find the gallon of vodka in his room to know that he was high as a kite on July 26, 1983. I've never understood why the bottle of vodka and pills were never mentioned by the state, and why David wasn't tested for the alcohol and drugs in his blood.

(Affidavit of William Bowling, PC 928-29).

Mr. Bowling testified at the post-conviction hearing in the state courts, as he would have testified at trial had he been allowed:

> Q Mr. Bowling, did you ever have occasion to see David drink or to see him when he was intoxicated?
>
> A Yes. We had some Christmas dinners we would have together. We would make up a big dinner and my wife and I and my brother-in-law and his wife come over

and we would get together then and always mixed up usually like vodka and orange juice and I believe rum and coke is what some of the others had drank and he would come in and have one drink and he would come in rather quiet like and after when he come in he would cheer up, talking everybody's head off, talking and --

(Testimony of William Bowling, PC 403.)

Q Let me put it this way. The day after David had been arrested, did you go to the house, to David's parent's house?

A Yes, I called the sheriff and asked permission to come feed the cattle, I had to fill up the water basins and I couldn't go until they were done with their investigations of course. And they gave me permission to come feed the cattle and I was the first one back in the house after the sheriffs and all were done with their investigation.

Q Okay. And you proceeded to go in the house and to clean it up?

A Yes, I did. I went in through the living room straightening up. Everything was thrown around and in David's bedroom is where I found the biggest mess. I found the drawers in the dresser that were dumped all over the floor and scattered all over and dumped up against the walls. And in the closet I found a gallon of Smirnoff's and half of it was gone. And I looked at it and I was wondering why it hadn't been taken as evidence since they were supposed to be collecting evidence around the house.

I made my way into his bedroom and on top of the dresser I found some black pills, and they were scattered all over the dresser, and I wondered why that wasn't taken because that seemed like it would be important evidence. But it was all left there like all of the other mess.

Q Did you clean up other parts of the house?

A yes.

Q Did you find anything else that related to these things that you found in David's room?

A Yes, I went out to get a bucket and mop and when I went out back in the back corner of the house in the utility room I found a mop but the bucket was missing. I went out back and I found a yellow bucket with a brown bag shoved down inside with a little bit

of water and I took it out of the bucket and a receipt fell out of it from Lennie's Lounge for the purchase of vodka.

Q Do you recall the date on that receipt?

A Yes, the date was dated the evening before the incident was the date on it. I noted that, I didn't know what it was doing out back there.

(PC 407-09).

Other family members also would have provided compelling evidence of Mr. Gore's history of alcohol and drug abuse, and the effects of his intoxication on his behavior on the day of the offense. For example, Mr. Gore's sister would have testified:

I did, however, see pictures of David right after his arrest on television and in the newspaper. When I saw those pictures, I said "That isn't David." I had never seen his eyes look that way before. It was like looking into the eyes of a stranger.

I now believe that the strange appearance of David's eyes were the result of his intoxication. After attending his trial, there is no doubt in my mind that David was being affected by drugs or alcohol the day of his arrest. In the days that followed his arrest I had seen evidence that he had been using drugs and alcohol right before his arrest. My husband had found a half filled gallon of vodka in David's room. He also found some pills which were clear capsules with blue and white beads. I flushed these pills down the toilet in order to ensure that my two-and-half year old son would not accidentally take some. I also noticed an aspirin-bottle with a clear yellowish paste in it.

When I heard the tape of David's confession being played at the trial, I knew for certain that he was drunk at the time. David was much too talkative during his interview with the detectives for him to have been sober. David has been an exceptionally quiet person his entire life. He has difficulty carrying on a conversation. He's very shy and withdrawn. The only time I can remember him being talkative was when he was drinking.

(Affidavit of Wendy Bowling, PC 919-20).

Mr. Gore's mother would have similarly testified, had she

been allowed to do so:

> The only time that David was ever talkative was when he was drinking. After just one beer, his entire personality would begin to change.
>
> Even before David was arrested in 1983, I had seen evidence that he had a problem with drugs. After David had been released from prison following his conviction for armed trespassing, Wendy and I found some white powdered pills in a collection of letters he had brought back from the prison. Another time my husband noticed that some of the valiums that had been prescribed to him were missing, and we knew for sure that David had been the one who had taken them.
>
> I was in North Carolina when David was arrested for the murder of Lynn Elliott, but I am certain that he was intoxicated that day. At David's trial they played the tape of his interview with the sheriff's office after his arrest. David was very talkative throughout the entire tape. The only time that I have ever seen David talk like that was after he had been drinking.

(Affidavit of Velma Gore, PC 910-11). Mrs. Gore testified at the state court post-conviction hearing:

> Q Mrs. Gore, could you tell Judge what David was like when he would drink?
>
> A Well, David, like I say, he was a quiet child and quiet person. He never talked much but you could see a change in David after he would have maybe one beer or something. You know, he would be very talkative and just a complete different person.
>
> Q His personality would change?
>
> A Yes.
>
> Q He would be more outgoing?
>
> A Yes, he would.
>
> Q Did you ever have an occasion to listen to a taped confession of David?
>
> A Yes, I did.
>
> Q And what were you impressions when you heard that taped confession?

A Well, my first impression was that it was not David. I mean it was not --

Q What do you mean by that, that it was not David?

A Well, it just didn't sound like him, he was too talkative, he was fast talking and it was just not his normal way of talking.

Q That fast talking, what did that remind you of?

A When he was drinking.

(Testimony of Velma Gore, PC 536).

Q Did you ever have occasion to believe that David might be using drugs other than alcohol?

A When? When could you--

Q When David was living with you after his . . . .

A Yes. I think several times that I had seen a few signs of David not only taking alcohol, but drugs, too.

Q And what were those signs, ma'am?

A Well, his father had had a prescription of Valium filled at one time and it was almost a complete, you know, prescription full, and he didn't use but just a few and then all of a sudden there were only two in there, in the bottle.

Q And only your husband and yourself and David were living at the house at the time; is that right?

A True.

Q And you didn't take those, did you?

A No.

Q Did you ever see any other signs that David might also have a drug abuse problem in addition to his alcohol abuse?

A Yes. In some of his letters, well, papers, not just letters, in a suitcase that he brought back with him there were some tablets, white powder substance in some of them. And there was another

occasion that there was, I think a blue and white capsule that was on his bedroom floor when his sister and I were straightening his bedroom up after he was arrested.

Q Did you ever visit David in Belle Glades?

A Yes.

Q Did David ever make a request for you to bring in some weight loss pills?

A Yes. He asked me on several occasions if I could bring him in some of the extra strength weight loss capsules.

Q When you heard that what did you think?

A Well, I asked him really, I mean why, he was losing weight, and I think my sister Mildred Waterfield was there and we made a remark that we couldn't take them because it would make us feel different. And he said, well, that's what he liked about it.

Q He liked the rush from those pills?

A Yes. Yes.

(PC 556-58).

Mr. Gore's father would have provided similar evidence:

David never really could drink much. He's not smart and he's easy to lead into most anything, but until he starts drinking he could at least try to resist bad influences. He would do things when he was drinking and later come back to his right mind and act as though a different person had been the one drinking and acting strange. David was normally very shy and quiet. Drinking would just turn him into a totally different personality and he'd be aggressive and completely unlike himself.

I know that Freddie got David started doing drugs too. He would leave the evidence of it in his room at the house, and Velma would find it sometimes. She found some white powder in there about 7 or 8 years ago and brought it to me. I tasted it, but I sure couldn't tell what it was. Not too long after that I was given a valium prescription for an illness, and I put the bottle away after I started feeling better and no longer needed the pills. One day Velma noticed that there were only a few pills left. Though we didn't confront him, we were sure David was the one that took

the pills.

(Affidavit of Alva Gore, PC 904). Like Mrs. Gore, Mr. Gore testified at the post-conviction hearing in the state trial court. Each would have testified to this evidence at the sentencing phase of their son's trial, had they been allowed to do so.

> Q Okay. What would happen when David would have a drink?
>
> A When David would drink his appearance would change, you know, I could tell when he was drinking and would come home because he was a little, acted a little different than he ordinarily would if he wasn't drinking. In other words, his eyes, when his eyes would be awful red and they are real glassy looking and at times he would talk a lot, get to talking a lot, and at times he would be real quiet. But I could tell when he was drinking because, you know, I could just tell the change in the looks of him and at times I've asked him, you know, when he come home what was wrong? I'd say, "What's wrong, David?" And he would say, "Nothing." And then I knew he was drinking pretty heavy.
>
> Q But you would see personality changes?
>
> A I would see personality changes when he was drinking.
>
> Q In those personality changes would David start talking a lot more?
>
> A Yes, sir. He would get a lot more talkative.
>
> Q Did there come a time, Mr. Gore, when you thought David may be taking other drugs, other than alcohol?
>
> A Yeah. Well, there was an incident, my wife found some kind of powdered substance in his room and she brought it to me and asked me what it was. And I looked at it and I even tasted of it but I couldn't tell what it was because I just didn't know what it was.
>
> Q And where did you find that white substance?
>
> A It was in his bedroom. I believe it was

under the bed, I believe it was under the bed.

(Testimony of Alva Gore, PC 463-65).

A Well, I knew he was drinking more because he was staying at the house more, he was coming over to my house and he was around me quite a bit and I knew when he was drinking more. He was drinking a lot more than usual. Because I could tell it.

Q Would you see the same kind of personality change that you talked about before?

A Right. I could see that. And a lot of times David would come home and he was just so withdrawn when he would come home he didn't hardly talk to us or his mother at all. And I think he, I mean that's the reason I guess that he started drinking so much. I don't know that to be a fact but during that point in time he was, I could tell, being around him I knew he was drinking a lot more on his actions and come home with his face red and his eyes all red.

. . . .

Q Now, Mr. Gore, did there come a time after David had been arrested in this case that you heard a tape played with David's confession on it?

A Yes, I heard a tape.

Q Do you remember hearing that tape?

A Yes, sir.

Q Can you tell Judge what David's voice sounded like on that tape and what was your opinion when you heard that tape as to David's state of mind?

A Well, when I heard the tape played in the court, that's where I heard it played, David really didn't sound like hisself, he didn't sound like his voice. I mean part of it was his voice but part of it didn't sound like his voice. I mean he just talked in a different tone than he usually does.

Q What about how quickly he was talking? Did it sound like the quiet David or did it sound like another David that you knew?

A Well, it sounded, well, no, it didn't sound like a quiet side. It sounded like it was more so the other side of David, the talkative side.

Q When did you see David get talkative? What would make David get talkative?

A Well, he would get pretty talkative every time he got on alcohol, he would get a lot more talkative.

Q Did you draw that conclusion when you heard that tape?

A Yeah, yes, I drawed a conclusion that he must have been drinking to sound like that.

(PC 469-71).

Mr. Gore's uncle would have provided similar testimony, and could have testified as to Mr. Gore's state of intoxication shortly before the offense:

Q Mr. Gore, did you ever see David drink?

A Yes, sir.

Q Did you ever see him other times when he appeared to be under the influence of drugs or alcohol?

A Yes, sir.

Q Can you tell us how David was different on those times when he was under the influence of drugs or alcohol from the other times you just described to us?

A Well, it's like he was all mouth then and he would get a few drinks and I couldn't tell if it was drinks or controlled substance. But I can tell when somebody is, if I listen to them long enough and I know Mr. Vocelle many years, and I think he can agree with me what I'm saying. Somebody that don't talk and they get a couple beer, whatever it might be, then the mouth starts pretty well --

Q This is the way David became? David became talkative?

A I would say, I could always tell when he had something. I didn't know what. Whether it might be marijuana or -- I couldn't say what he was ever on.

Q Okay. Is it fair to say when David was on these things that he was a completely different person?

A By all means.

. . . .

Q Can you tell me any other changes in David's personality when he was on these substances other than being talkative?

A Well, I don't know if it was jokingly or if he was going to take his uncle on, "Come on I'll whip you." And I'd say, "Come on David, let's knock it off here." That's about the only thing that I can answer to that really.

Q So he would challenge you, try and take you on?

A He would challenge anybody.

Q When he was drinking?

A Yes, sir.

. . . .

Q Let's first establish, do you recall when David was arrested, not the date, but do you have in your mind when David was arrested?

A The very next day.

Q So you saw him the night before; is that right?

A Yes, sir. Yes, sir.

. . . .

Q He was heavy under the influence of something?

A Yes, sir. Something. I couldn't say what. I could not say what he was on but he was definitely on something.

Q And it wasn't just moderate, I mean he wasn't a little bit high or a little bit drunk, he was very intoxicated?

A Like I said, he was wiped out.

Q Okay.

A He could still maneuver but -- do you understand when I say wiped out?

Q I understand, sir.

A I don't mean you can't walk or you could stagger a little bit. I'm talking about wiped out, he was very much under the influence of something. I don't know, I still want to call you Mr. Vocelle.

Q What was David's speech like when he came to see you? How did he talk?

A His speech wasn't bad at all.

Q All right.

A But he would drift from one thing to the other. I sat down there, and I got behind my desk because to make my rounds, you know, every once in a while, and I was checking the pool, it was shortly after dark. He said, "Let's go swimming." And I said, "Son, I can't go swimming."

Q Where did David want you to go swimming at?

A Right behind my office there there is a big spa and real big swimming pool out there at Lakewood.

Q Did David have his swimming trunks on?

A No, he was going in with his clothes and all. And I said, "Son I can't -- " because I was just getting ready to lock it. Well, it must have been about 9 o'clock and I locked the gate and nobody could go in there after 9 o'clock because I locked it. So it had to be close to that.

Q Was David talking a lot?

A Yeah, like he needed some Pepto-Bismol or something like that.

Q Was this the quiet David that you had known?

A He was 100 percent, maybe 99 percent, I can't get in these percentages without my calculator, but he was heavily under the influence of something.

(Testimony of Joseph Gore, PC 368-71.)

Q Okay. Having seen David the night before he was arrested and having seen him completely wasted and hearing David had been arrested for this offense the next day, what did you think?

A I didn't believe it and I still don't. I

still don't believe it.

Q Do you think it might have had anything to do with the fact that David was intoxicated?

A That's the only time David would hurt a little puppy dog, that's the only time he could have done it, if he was under the influence of any kind of controlled substance, whether it be vodka or beer or whatever, you know, you can to go extreme with that or anything and I'm telling you because I have been to that extreme a few times. So and I don't think there is not too many people in this courtroom that hasn't.

Q You've testified that David was easily led. Was it even more -- could you lead David even easier when he was drunk? You told me a story one time out at your house about if you had some alcohol there and you had David; could you tell us that story?

A If I had alcohol there --

Q Yes, and if you had David there and you wanted to do something; do you recall that?

A Well, that's like a drug addict, if they want a rock, you know, they will sell their soul for it. And if he wanted a drink I'd say, "All right, David," if I happened to have a pint of whiskey or whatever it might be, "David, I want you to go over there and just slap him down," regardless of who, you know, if I would have wanted to, and he would have did it. And he was as much of a man, I guarantee you right now, he's a gentleman on top of that.

(PC 381-83).

Another of Mr. Gore's uncles, who was present at Mr. Gore's arrest and who observed his affect and demeanor immediately after the offense, would also have presented compellingly mitigating evidence in this regard:

Lonnie Gore was one of the officers from the sheriff's office who was present when David Gore was arrested for the murder of Lynn Elliott. Lonnie, who has known David since David was born, said that the David Gore he saw that day "was not David, at least not the David I had always known."

Lonnie said he was struck by the appearance of David's eyes that day. He had never seen his eyes look

> the way they did that day. They had a glassy, wild look to them. Lonnie believes that the strange appearance of David's eyes could have been caused by drugs or alcohol.

(Affidavit of Jonathan Broun, PC 933).

Defense counsel was ready to present a great deal of significant mitigation. The trial court, however, on the basis of the prosecutor's objection, excluded the evidence from the jury's consideration. As the affidavits and testimony presented to the state post-conviction courts and thereafter reviewed by the District Court and Court of Appeals demonstrated, the family members and others would have provided critical and compelling mitigating information regarding, inter alia, Mr. Gore's childhood and background, his emotional and mental development and impairments, his troubled marriage, his life-long dependent relationship with Freddy Waterfield, his ongoing problems with alcohol and substance abuse, his family's history of chronic alcoholism, and his diminished mental status at the time of the offense. Detailed expert mental health testimony was also presented to the state post-conviction courts which spoke to the veracity of the alcohol/drug use mitigation which counsel had sought to present, but was precluded from presenting, to the sentencing jury.

The evidence was summarized above. The affidavits submitted to the state post-conviction courts and then to the District Court on this issue related the following:

> My name is Alva Gore, and David Gore is my son. My wife and I raised our children in Vero Beach, Florida, and we now live in Pickens, South Carolina.
>
> I know in my own mind that David wasn't quite

right. I can't say exactly what was wrong with him, but he just didn't act like other children. He wouldn't associate with other people, though I often wished he would. He was such a withdrawn child, and this continued to be true as he grew up.

David had some very high fevers--105 and 106 degrees--when he was an infant. He went into convulsions with them once or twice. I've sometimes wondered if maybe those fevers didn't have something to do with him ending up with the kind of problems that he did.

David always bottled up his emotions, as far back as I can recollect. The only way I could ever tell when something was upsetting David was that his foot would start to tap. David would not say anything about what was bothering him but that foot would just tap and tap. This kind of behavior always struck me as kind of odd.

When I punished David, I usually did so by hitting him with a belt in the place God provided for receiving punishment, which is the butt. David's mother used both switches and a paddle to punish and train David. While I tried not to really hurt David or his sister, Wendy, I guess I was stronger than I knew. I once slapped my sister in the face and her face was paralyzed on that side as a result. I don't remember ever hitting David in the face, but I couldn't say I didn't. Things like that can happen out of pure anger and frustration.

David never was any good in school. One time the school said he cheated, and when they asked him why, he said it was because he was afraid of what his mother and me would do to him if he failed the test. I can't say that I ever paid much attention to his schooling. David just never had a mind to be smart, so him bringing home failing grades didn't surprise or concern me too much.

I always tried to provide for my family as best I could. My own father never had any money, and had to struggle to take care of us. He would hunt coon, frog and other things just to keep food on the table. When my wife, Velma, and I got married we lived in a 8 by 10 foot shack. By the time David was born we'd managed to build a 12 by 24 foot house out of second hand lumber. We had no money for windows, so I nailed roofing paper up to where the glass should have been. I got $100 worth of supplies for the house, and I paid back about $10 a month.

At first, we had no indoor plumbing at all. I eventually got a commode and put it into a corner of the house. We also drilled our own well and put in a 12 foot deep pipe. We had a kerosene heater to keep us warm. I wouldn't leave it on at night because of the expense. I'd get up in the morning and heat it. It would usually flare up, and I'd have to get back up and hit it to get it going right. Then I jump back into bed to get out of the cold.

Velma and I always tried to keep a little something on the table. David and his sister usually had cereal or toast for breakfast. Because I was making about $40 a week back then and went $5 to $10 in the hole each week, there were times when there just wasn't any money for groceries. Velma and I would kill alligators for money and buy groceries. I'd often hunt and fish for our supper, and when David was old enough he would go with me.

I know that growing up like this was hard on the children. Velma and I were used to it, but I wished I could have done more for my kids. Because David was so slow and odd, I feel like he suffered the most for not having a nice home, nice things and the special treatment he needed.

Velma comes from some hard luck herself. Her father, William Webb, was an old moonshiner and a vicious drunk. Velma and her sisters would have to hide under the bed or run out into the woods whenever he'd come home drunk. He got so drunk and mean that he'd threaten to kill them and just about scare them to death. The Webbs lived nearby, and William didn't get too much better as he aged.

Because of Velma's experiences with her father, she always hated for me to drink. Watching me drink really upsets her. I never really thought too much about my own drinking, but when David took it up about 10 years ago, I knew that was a mistake. His cousin, Freddie, got him started. Freddie was much smarter than David and could get David to do anything. He had an especially strong influence on David because David never really was able to make friends. David really needed Freddie, and Freddie knew it.

David never really could drink much. He's not smart and he's easy to lead into most anything, but until he starts drinking he could at least try to resist bad influences. He would do things when he was drinking and later come back to his right mind and act as though a different person had been the one drinking and acting strange. David was normally very shy and

quiet. Drinking would just turn him into a totally different personality and he'd be aggressive and completely unlike himself.

I know that Freddie got David started doing drugs too. He would leave the evidence of it in his room at the house, and Velma would find it sometimes. She found some white powder in there about 7 or 8 years ago and brought it to me. I tasted it, but I sure couldn't tell what it was. Not too long after that I was given a valium prescription for an illness, and I put the bottle away after I started feeling better and no longer needed the pills. One day Velma noticed that there were only a few pills left. Though we didn't confront him, we were sure David was the one that took the pills.

Even though I knew that David needed help, I was still completely unprepared for what happened on July 26, 1983. Velma wasn't prepared either. We were in the mountains when we got a message to call Vero Beach collect. We went down the mountain to a store to call. After I made the call and got into the car, Velma was pressuring me to tell her what it was about. I finally told her, and she tried so hard to jump out of the car that I had to pull off the road and calm her down.

After we got back to Vero, I talked with Roy Raymond, the second in command at the Sheriff's Office there. I knew David was out of his mind that day and so did Roy. I told Roy that had I been there I would have gone into the house myself to get David. Roy said they wouldn't have let me, that "that wasn't David in there." David has said the same thing to me, that he wasn't himself. He told me that when the police surrounded the house he just sat down at the kitchen table and had a glass of water. We agreed that that was no way for a normal person to respond to what was going on all around him.

I can't help but think that if I'd have gotten David some help 15 years ago things wouldn't have ended up like they did. That's something I have to live with. I just didn't know what to do for him or where to turn, but I know I should have done something.

(Affidavit of Alva Gore, PC 901-06).

My name is Velma Gore, and I am the mother of David Gore. I currently live in Pickens, South Carolina with my husband Alva Gore.

The house that David grew up in had to be built by my husband and myself. It started as a 12 foot by 24

foot room, and we tried to make additions to it whenever we had enough money. When David was young, our home was heated by a kerosene heater. My husband, and later David, hunted for our food. I had to make the children's clothes. When he was 14, David got a job working in orange groves, and he used that money to buy his own clothes and other necessities.

When David was 17 months old he somehow fell into a bed of stinging ants. He went into convulsions. By the time I got David to the doctor's office, his temperature was 105°. They gave him some kind of shots that after a while brought the fever down, but I have always wondered what the effects of that poison may have been on him.

Exactly one month later, he went into convulsions again. When he got to the doctor, his temperature was again 105°. The doctor showed me how to apply ice compresses and bathe him in alcohol, but the fever did not break for two days.

David's behavior always concerned me. As a child, David was very quiet and withdrawn. He had difficulty sustaining a conversation even with members of his own family. While his sister, Wendy, and I were and still are very close, as hard as I tried I could never get David to open up to me. I believe that David did not have the social skill necessary for a truly close relationship.

Throughout his entire life, there have been periods where David would for no apparent reason become completely withdrawn. I never knew what caused him to go into these moods and he never told me.

I had always wondered whether David needed professional help. Although I always knew there was something wrong with David, I never let myself think that things could have ended up like that. It aches my heart that we did not get him any help when he was younger. I now believe that if we had done that, he wouldn't have ended up like he did.

If David was really close to anybody growing up, it was Frederick Waterfield. However, his relationship with Freddy has always greatly troubled me. Freddy was David's idol, and he could get David to do anything he wanted him to. When David was with Freddy, he would behave in a manner completely different than when he was around anybody else. I was so concerned about Freddy and David's relationship that I was constantly making efforts to separate the two of them.

My attempts at separating them didn't work. Throughout their entire lives, Freddy and David were constant companions. Even after David married Donna, he and Freddy were always together. I was always afraid that with the type of influence that Freddy had over David, he was going to get David into trouble.

When David was a child he told me that he saw something red that glowed, that had sort of floated around his room. Later he told me it had come from a flying saucer.

David's children, Michael and Jonathan, mean everything to him. When Donna and David split up for the second time in 1981, and Donna got custody of his sons and prevented him from seeing them, David was absolutely devastated. I tried to console him, but he was too upset.

I remember one time we were discussing the situation with the children, David began crying and screaming at me, "You just don't understand!" It is the most emotional I have ever seen David. It was the first time I had ever seen him cry or yell at me.

The only time that David was ever talkative was when he was drinking. After just one beer, his entire personality would begin to change.

Even before David was arrested in 1983, I had seen evidence that he had a problem with drugs. After David had been released from prison following his conviction for armed trespassing, Wendy and I found some white powdered pills in a collection of letters he had brought back from the prison. Another time my husband noticed that some of the valiums that had been prescribed to him were missing, and we knew for sure that David had been the one who had taken them.

I was in North Carolina when David was arrested for the murder of Lynn Elliott, but I am certain that he was intoxicated that day. At David's trial they played the tape of his interview with the sheriff's office after his arrest. David was very talkative throughout the entire tape. The only time that I have ever seen David talk like that was after he had been drinking.

David later told me that the day he was arrested, he was considering ending his life. When the deputies had surrounded our house, they had warned David that he should come out with his hands up. David said that he considered lowering his hands and making a run for it, so that the deputies would have to shoot and kill him

immediately.

(Affidavit of Velma Gore, PC 908-12).

My name is Dorothy Stokes and David Gore is my nephew. His mother, Velma Gore, and I are sisters.

After the events of July 26, 1983, I believed David's problems were probably due in large measure to alcohol abuse. Alcoholism has devastated our families for generations. Both David's great-grandfather, Will Webb, and David's grandfather, William Webb were alcoholics. In that family there are uncles, aunts, cousins, nephews and nieces who suffer from alcoholism and many have been, are being, or should be treated for it.

The alcoholism in my family made growing up for me a nightmare. I was physically, mentally and sexually abused by members of my family. My step-father, who was David's grandfather, was violent and brutal when drinking. He beat me up and his cousins and father sexually assaulted me during the time I was growing up in his house. He made and sold moonshine whiskey and his drunken rampages occurred more than once a month. In fact at that time there was hardly a time that they were not drinking.

He treated my sisters the same way. In order to escape his brutality, I begged relatives to take me out of that house to live with them when I was nine years old, and got married when I was fifteen.

Velma Gore and Mildred Waterfield never left our parents. They raised their families in the same compound where my parents' lived. I have always been concerned that their children might be exposed and subjected to the same abuse I suffered while growing up.

When I found out in 1983 that Wendy had been sexually assaulted by Frederick Waterfield when she was in the ninth grade, my fears were confirmed. The cycle of family members abusing each other had been passed down another generation. Because members of my family have always been reluctant to admit that they have been abused, even to the people they are closest to, the full extent to which children from that generation may have been abused may never be known.

Even before David was arrested for the murder of Lynn Elliott, I felt that he was suffering from serious mental problems and needed psychological help. I believe that childhood fevers, drugs and alcohol and a

personality that let others control contributed greatly to these problems.

On several occasions, David's mother, Velma, told me how when David was very young he suffered from prolonged high fevers and convulsions. Velma also told me that David often saw strange lights at night in his room when he was a little boy which he said came from flying saucers.

David was a very timid, quiet child. When he and Freddie were together, David was the follower. Freddie was the more dominant, forceful personality.

For many years, David worked in the citrus groves around Vero Beach. At the groves, I know that he was constantly exposed to chemical sprays and pesticides and I was worried about the effect these chemicals might be having on him.

When David's marriage started to go bad, his personality changed. He started to drink heavily and use drugs.

David's second divorce devastated him. His wife Donna won custody of Michael and Jonathan, David's sons, and she was preventing him from even seeing them. They were the most important things in his life, and the fact that he was losing them was destroying him. He once wrote to me that he would "rather go to his grave than not be able to see his children."

(Affidavit of Dorothy Stokes, PC 914-17).

My name is Wendy Bowling and I am David Gore's sister. I am three years younger than David and I am his only sibling. I currently live in Pickens, South Carolina with my husband Bill, and our two children, Billy who is seven, and Tamara who is three.

On July 26, 1983, Bill and I were living in Vero Beach, Florida. I received a call that afternoon from Mildred Waterfield, my aunt and the mother of Frederick Waterfield, informing me that there were people from the sheriff's office at my parents' house, that I should call David's attorney and come right over. I contacted Cal Brown, the attorney who was handling David's divorce proceedings, and then Bill and me drove out to our parents' house.

When I got there, I saw that deputies from the sheriff's office were already there, including my uncle, Lonnie Gore. Lonnie told me, "David has flipped. David's not David, you don't want to see

him," and he convinced me to go to my grandparents' house next door. I never saw David in person that day.

I did, however, see pictures of David right after his arrest on television and in the newspaper. When I saw those pictures, I said "That isn't David." I had never seen his eyes look that way before. It was like looking into the eyes of a stranger.

I now believe that the strange appearance of David's eyes were the result of his intoxication. After attending his trial, there is no doubt in my mind that David was being affected by drugs or alcohol the day of his arrest. In the days that followed his arrest I had seen evidence that he had been using drugs and alcohol right before his arrest. My husband had found a half filled gallon of vodka in David's room. He also found some pills which were clear capsules with blue and white beads. I flushed these pills down the toilet in order to ensure that my two-and-half year old son would not accidentally take some. I also noticed an asprian-bottle with a clear yellowish paste in it.

When I heard the tape of David's confession being played at the trial, I knew for certain that he was drunk at the time. David was much too talkative during his interview with the detectives for him to have been sober. David has been an exceptionally quiet person his entire life. He has difficulty carrying on a conversation. He's very shy and withdrawn. The only time I can remember him being talkative was when he was drinking.

While David was never talkative while he was growing up, there were times when he would become extremely quiet. He would get into these moods where he didn't want to talk to you and you were not going to ask him any questions. He just wanted to be by himself. I never knew what caused him to go into these moods, and I never asked him. I just assumed he was being David.

Growing up, I used to envy some of my friends relationships with their siblings, because David and I never were close. David never opened up to me or showed me any signs of affection. He never told me that he loved me or put his arms around me. I have always had a feeling that David has been jealous of me because I was much closer to our parents than he was. I also believe he was jealous of the fact that I had such a successful relationship with Bill. I think David was frustrated that he could not seem to have a real close relationship with anyone because he lacked the social skills.

David was very upset when he split up with his wife Donna for the second time in 1981. He was particularly depressed by the fact that he lost his kids in the custody battle, and Donna was preventing him from seeing them. Michael and Jonathan, David's sons, were the most important things in the entire world to David.

One time I walked into my parents home while David and my mom were discussing the fact that Donna was preventing David from seeing his sons. David was crying and yelling, "You just don't understand!" It was the first time I had ever seen David cry or raise his voice to our parents. It was then that I began to realize the extent to which Donna had destroyed David.

I saw David the weekend before he was arrested for the murder of Lynn Elliott. His behavior at that time troubled me. On Saturday, Bill, my son Billy, and myself went over to my parents house so Bill could work on some cars. David was there and he was acting very strange and seemed very depressed. He was acting nervous. He was even more withdrawn and quiet than usual.

David wouldn't respond to any of us, even Billy. Billy would try to play with him, but he didn't want to have anything to do with Billy. This upset me, because David and Billy were very close and David had never refused to talk or play with him before. That night I talked with my mother who was in North Carolina at the time, and I told her that David was not acting right. The next night, David came over to our house for supper, and he was acting in the same way as he had Saturday.

The next time I talked with David was the day he was arrested. We talked on the phone that morning, and he was acting completely different than he had been that weekend. He was very talkative and was asking about all sorts of things that he would never talk about normally. From the way that David was talking, I knew that he had to have been drinking.

Shortly after his arrest, David told me that when he came out of the house and surrendered, he was considering ending his life right then and there. David had taken law enforcement courses and had served as an auxiliary deputy for the Indian River County Sheriff's Office. He knew that if he lowered his arms he would have been shot and killed immediately. David said he was seriously considering putting his arms down and making a run for it so he we would be shot and killed.

David also told me that while the crime was happening, he felt like he was standing outside of his body. It was like he was watching somebody else. He also told me that at times he could feel himself being tainted by someone else. It was as if someone was taking over his personality. And he had been trying to hide what was happening from our parents.

David also had illusions as a child. Sometime when he was between the ages of 10 and 13, he told my parents and me that he was seeing many different colored lights coming through the window in his room. David told us that they were coming from flying saucers. I never saw any of these lights even though the window in my room was facing the same side of the house as the window in David's room.

David and Frederick Waterfield were very close when they were growing up. Freddy was David's idol. Freddy was very domineering. I could tell from the times I played with the two of them that Freddy was able to get David to do exactly what Freddy wanted him to do.

When I was in ninth grade, Freddy sexually assaulted me. I had just left my bedroom and was walking towards the family room, when Freddy grabbed me from behind and pulled me into my bedroom. David was with him. David held me down while Freddy took off my pants and penetrated my vagina with his fingers. As this was going on, I was screaming for them to stop and threatening to tell on them. Freddy was instigating and directing the entire incident. I had the feeling this was not the first time Freddy had done something like this, and now he was teaching David how to do it too. After Freddy had penetrated my vagina with his fingers, David said "No, that's my sister," and pulled him away from me.

. . .

While this was the first time Freddy had sexually assaulted me, it was not the first time that I had seen him make sexual assaults at someone. When Freddy was ten or eleven, I spotted him assaulting a friend of mine, who was eight at the time.

(Affidavit of Wendy Bowling, PC 919-24).

My name is Bill Bowling and I live in Pickens, South Carolina, where I work as a machinist at Southeastern Industrial Services. I am married to Wendy Bowling, who is David Gore's sister. I have known David for almost twenty years.

On July 26, 1983, Wendy and I were living in Vero Beach, Florida. That afternoon, Wendy got a call from Mildred Waterfield, her aunt and the mother of Frederick Waterfield, telling her that cars from the sheriff's office were at her parents house and she should come right over. When we got there, Wendy was sent to her grandfather's house next door by her uncle, Lonnie Gore, a deputy with the Indian River County Sheriff's Office.

After Wendy went to her grandfather's house, Dorothy Stokes (Wendy and David's aunt), Mildred Waterfield and myself all pleaded with David to give himself up. After I talked with him through a megaphone, David surrendered to the sheriff's deputies.

David was instructed to keep his hands up as he left the house. He later told me that he was considering putting his hands down and making a run for it, so that that he would be shot and killed right then and there.

David was not the only person in the family who wanted to end his life because of what happened that day. When David was arrested, his parents were vacationing in North Carolina. I have been told that when David's father, Alva Gore, told David's mother, Velma Gore, that David had been arrested for murder, they were driving back to their cabin. When Velma heard about David's arrest, she tried to jump out of the car which was going over sixty miles per hour through winding mountain roads.

After the police were through searching my in-law's house, I found a gallon of vodka in David's room that was half empty. I also found a receipt from Lenny's Lounge for the vodka which indicated that it had been bought the day before David had been arrested. I also found a bunch of pills laying around the dresser in David's room. I think they were amphetimines.

Even before July, 1983 I thought David had some serious mental problems and needed professional help. He was so quiet, and he always seemed uncomfortable and ackward around people. Wendy and David's parents are not very talkative either, but David is exceptionally quiet. If you tried to start a conversation with him, he would cut you off. I often tried to talk with him, either when we were alone or with other people, but he didn't seem to know how to carry on a regular conversation. I can't really explain it, but David just wasn't like other people.

The only time I ever saw David really talk was

when he was drinking. He would have just one drink and five or ten minutes later he was a completely different person. When David wasn't drinking, he would answer questions with just a "yes" or "no," and would never begin a conversation himself. When he's had a drink, he would be talking your ear off. He was more aggressive when he was drunk, and he would act in bizarre ways and do crazy things. When he was drinking he wouldn't even consider what the results of his actions might be.

Because I know David so well and have known him for so long, I knew he was drunk the day he was arrested and talked to the deputies. The only time he would talk loosely like that was when he was drunk. I didn't need to find the gallon of vodka in his room to know that he was high as a kite on July 26, 1983. I've never understood why the bottle of vodka and pills were never mentioned by the state, and why David wasn't tested for the alcohol and drugs in his blood.

People did not think very much of David, and he realized this. The people who meant most to David were constantly belittling him, including his parents. Donna, David's wife was constantly putting him down and making him feel lousy. Even though David wasn't somebody I looked up to or wanted to be like, I always felt bad when people would mistreat him. It's just not right to be mean to people who are slow and different. David really didn't have friends. People would rather make fun of him than be friendly to him. David ended up spending a lot of time with his cousin, Frederick Waterfield, for this reason.

I've always thought of Freddy Waterfield as the kind of person who would land you in some trouble pretty quick, but David worshipped Freddy. The two of them were always together. David would follow Freddy anywhere and do anything that Freddy wanted him to.

The power that Freddy had over David really became apparent to me when I saw the way the two of them interacted during fishing trips. There was nothing that David loved as much as fishing, but he would often quit fishing and eagerly go off with Freddy just because Freddy wanted him to.

Freddy gave David a sense of importance. While most people did not think much of David, Freddy was a member of the football team, did well academically and was popular. It gave David a real sense of pride that someone like Freddy would pay that much attention to him.

It doesn't take much to influence David. He's a lot like Wendy in that way. They're both easily led. David isn't capable of doing alot of thinking on his own and he doesn't really think about what the consequences of his actions are going to be.

David was also handicapped because of how poor his family was when he was growing up. Maybe if they'd had the money or the education to realize how seriously David needed help, David wouldn't be where he is today. The reality is that up until David was in his middle teenage years the family lived in a small, wooden house built by Alva Gore's own hands. My father-in-law has told me how tight money was back then, and how he would feed his family by hunting. He has told me that when one of the children got sick or the family needed anything besides the very bare necessities, he would catch frogs and earn what he could selling them. They lived a very hand-to-mouth kind of existence. Though I wish David could have been properly cared for and seen to, I understand how difficult live was for the whole Gore family.

(Affidavit of William Bowling, PC 927-30).

My name is Jonathan Broun and I am an investigator with the Office of the Capital Collateral Representative.

On February 23, 1988 I talked with Lonnie Gore, who is David Gore's uncle. Lonnie Gore is presently a deputy with the Indian River Sheriff's Office.

Lonnie Gore was one of the officers from the Sheriff's Office who was present when David Gore was arrested for the murder of Lynn Elliott. Lonnie, who has known David since David was born, said that the David Gore he saw that day "was not David, at least not the David I had always known."

Lonnie said he was struck by the appearance of David's eyes that day. He had never seen his eyes look the way they did that day. They had a glassy, wild look to them. Lonnie believes that the strange appearance of David's eyes could have been caused by drugs or alcohol.

Before David was arrested, Lonnie had often times seen Frederick Waterfield and David together. During these times, it appeared to Lonnie that Freddy was the leader and David would be his follower.

Mr. Gore was willing to sign an affidavit to these facts, but there was no notary public at the place of

his work, and he was unable to leave his place of work to go to a notary public.

(Affidavit of Jonathan Broun, PC 933-34).

My name is the Rev. Fritz Bowman and I am a pastor in the prison ministries in Florida. When David Gore was incarcerated in the Indian River County Jail waiting to be tried for the murder of Lynn Elliott, I met with, counseled and offered spiritual guidance to him on several occasions.

While I was counseling David, he told me that the day he had been arrested he had been using both drugs and alcohol and that these substances had caused him to lose his mind.

David also told me that he feared Frederick Waterfield. David said that throughout his life Freddy had been capable of making him do anything.

(Affidavit of Rev. Fritz Bowman, PC 936).

The District Court and Court of Appeals ruled that the eighth amendment error involved in the state trial court's exclusion of such evidence could not be deemed harmless beyond a reasonable doubt. Given "the circumstances of this particular trial," Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991), there can be little doubt regarding the critical importance of this evidence and the fact that the jury should have been allowed to learn of it. Intoxication is obviously a critical factor counseling for a sentence less than death. Additionally, as recognized by Florida law, a history of alcohol and/or drug problems is strictly mitigating, regardless of whether or not it directly relates to the offense. See Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988)("Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol on the night of the murder.... The jurors should have been allowed to consider these factors in mitigation"); Fead v. State,

512 So. 2d 176 (Fla. 1987)(court has "held improper an override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder', along with 'stronger' evidence of a drug abuse problem"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug dependency may be used to mitigate recommended sentence); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)("history of drug abuse" one factor rendering jury override improper); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985)(history of drug abuse among factors rendering jury override improper); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(override improper due in part to defendant's "drinking problems" and history of alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime). See also Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (in banc) (possible intoxication at time of offense is mitigating).

The evidence excluded by the sentencing court would have established that David Gore had severe problems with alcohol and substance abuse, that those problems had significant effects on his personality and behavior, and that he was likely under the effects of intoxicants at the time of the offense. Moreover, the excluded evidence would have informed the jury of what the State already knew: that codefendant Freddy Waterfield had an "overpowering effect," a "duress and emotional effect" over David Gore, and especially so when David drank. See section B(2), infra. Waterfield had had such an influence on Mr. Gore for a long time, and "where they were working together as a team, the

man who was most responsible ... was Fred Waterfield." State v. Waterfield (prosecutor's argument).

Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 481 U.S. 393 (1978), teach that evidence relating to the defendant's character and background and/or the circumstances of the offense must be considered in order for the capital sentencing determination to be reliable, meaningful, and individualized. The trial court nonetheless refused to allow the evidence in Mr. Gore's case.

The parties, the District Court, and the Court of Appeals are in agreement that the trial court's ruling here violated established principles of eighth amendment jurisprudence.

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider [or be precluded from considering], as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed the jury to disregard the mitigating evidence [Mr. Gore] proffered on his behalf. The sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982)(footnote omitted) (emphasis in original). By refusing to admit the evidence, the court prohibited the jury from even hearing it, much less from considering it. The eighth amendment error here is thus more egregious, and more plain, than the errors at issue in jury instruction cases such as Hitchcock v. Dugger, 481 U.S. 393 (1978).

Mr. Gore's sentencing jurors were not allowed to hear or consider significant mitigating evidence. The Florida Supreme

Court itself has explained that,

> [T]he standards imposed by Lockett bind both the judge and the jury under our law.... If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). And the mitigating facts here were credible and reliable, as the District Court found.

2. Codefendant Domination

During the sentencing proceeding, defense counsel also tried to present evidence about the relationship between David Gore and the co-defendant Frederick Waterfield, and specifically about Waterfield's domination of Mr. Gore in this case (See, e.g., R. 3085). The State objected. The judge suggested that defense counsel was "trying to get in indirectly what he could not get in directly" (R. 3092). The trial court then ruled:

> [T]o permit you [now] to bring in evidence that this defendant acted under the substantial domination of another person in the Court's opinion is not going to the character of the defendant, but going into another mitigating factor. In the Court's opinion it's highly prejudicial to the State of Florida.

(R. 3093)(emphasis supplied). Defense counsel insisted that he was attempting to prove mitigating circumstances relating to the codefendant's substantial domination of Mr. Gore at times approximate to the offense (R. 3093-94), circumstances relating to the history of Waterfield's dominance of and influence over Mr. Gore, and the inherently passive and dependent "character" of Mr. Gore. The trial judge nevertheless sustained the State's objection.

Defense counsel then sought to introduce evidence of Mr. Gore's difficult background. In accordance with the restrictive view imposed earlier, the trial court once again precluded the inquiry. For example:

[Direct Examination by Defense Counsel Long]

Q Did David finish high school?

A He dropped out about -- well, a few months before his graduation.

Q Why did that happen, do you know?

THE COURT: Now, Mr. Long --

MR. STONE [prosecutor]: Your Honor --

THE COURT: -- I believe you must proceed along the rulings of the Court. We're dealing with the character of the defendant, David Alan Gore, consistent with my ruling.

MR. STONE: Your Honor --

THE COURT: As to why he dropped out of high school, the objection is sustained.

MR. LONG [defense counsel]: Your Honor, may we approach the bench?

(The following bench conference was held:)

THE COURT: It was my understanding that you stated the reason he dropped out of high school was because of Waterfield. That was my understanding.

MR. LONG: Right, but that's not necessarily going to show domination.

THE COURT: What other purpose would it be for?

MR. STONE: That doesn't go to the element of the defendant's character.

THE COURT: Why would it come out? What other purpose would it be?

MR. STONE: You know, I --

MR. LONG: I'm trying to avoid the domination issue, but get into the history of his life.

* * *

THE COURT: Why he dropped out of high school and the relationship between him and Waterfield and so forth, unless it goes to the particular time of the offense, the objection will be sustained.

MR. LONG: Okay. Your Honor, I do believe that your ruling violates the rules set forth in Lockett versus Ohio.

THE COURT: I've already ruled, gentlemen. I want to be consistent with my ruling.

(R. 3098-3100).

Mr. Gore presented in state court post-conviction proceedings the mitigating evidence relating to the relationship between Waterfield and Mr. Gore and Mr. Gore's background and character, evidence which would have been presented to the sentencing jury by his trial counsel had the court not precluded its introduction. Numerous family members and friends would have then substantiated (and now substantiate) Waterfield's complete domination of Mr. Gore and Mr. Gore's particular susceptibility to such influence. Mr. Gore's mother would have testified about the relationship:

> If David was really close to anybody growing up, it was Frederick Waterfield. However, his relationship with Freddy has always greatly troubled me. Freddy was David's idol, and he could get David to do anything he wanted him to. When David was with Freddy, he would behave in a manner completely different than when he was around anybody else. I was so concerned about Freddy and David's relationship that I was constantly making efforts to separate the two of them.
>
> My attempts at separating them didn't work. Throughout their entire lives, Freddy and David were constant companions. Even after David married Donna, he and Freddy were always together. I was always afraid that with the type of influence that Freddy had

over David, he was going to get David into trouble. (Affidavit of Velma Gore, PC 909-10). Mrs. Gore also testified at the state court post-conviction hearing:

Q Who did he hang around with in 1983?

A Freddy Waterfield.

Q Did he hang around anybody else to your recollection?

A Not to my knowledge, I can't, no.

Q Did he also work for Freddy?

A Yes.

Q Would he go out with Freddy in the evenings?

A Yes, quite a few times.

Q Did you have an occasion in 1983 to be around Freddy Waterfield?

A Yes.

Q Could you tell us what kind of personality Freddy had?

A Well, Fred was always a, kind of a nervous, talkative, happy-go-lucky type of person. He was never lost for words and in a group he always kind of stood out.

Q Popular?

A Yes.

Q Did he have a strong personality?

A Yes.

Q Did that ever give you any concern when Freddy was around David?

A Well, usually whenever David was with Freddy his actions would kind of change, too, he would tend to be more like Freddy than himself, you know, he would be more like you say he was trying to be like Freddy.

Q Was David the follower?

. . . .

A I'm sorry, David was a follower. He seemed like he would go along with most anything Freddy would suggest or do. It seemed like he would be willing to.

Q Is it fair to say that Freddy dominated David?

A Yes.

(Testimony of Velma Gore, PC 534-35).

Mr. Gore's father also testified regarding his son's relationship with Waterfield:

Q Was Freddy like David, Mr. Gore?

A No. Freddy wasn't just exactly like David. I think Freddy was probably more, I guess more smarter and more ambitious than David.

Q More outgoing?

A More outgoing, yes, than David was. To that sense of the word I believe there was quite bit of difference between the two of them.

. . . .

Q Is it fair to say that Freddy had a stronger personality than David?

A I think he did. I think Freddy had a little stronger personality.

Q Do you remember a time when the boys got into trouble, both Freddy and David, and they ran away?

A I remember the time, yes.

Q Do you recall where they ran to?

A They went up to Detroit, Michigan.

Q Did David have any friends in Michigan?

A Who had friends in Michigan?

Q Freddy Waterfield had friends in Michigan.

A So David went with him when he ray away?

A David went with him, yes, sir.

Q Is it fair to say that Freddy could talk David into things like that?

A Yeah, I believe, yes, I believe he could talk David into doing things.

(Testimony of Alva Gore, PC 461-62).

Q Yes. Is it your testimony today that Freddy Waterfield influenced David your son?

A Well, I believe to a certain, to quite a bit of extent he did influence David on a lot of things.

Q Led your son?

A Sir?

Q Led your son?

A I didn't understand you.

Q Did Freddy Waterfield lead your son?

A He was, he led him quite a bit, yes, I figure that he was kind of a leader.

. . . .

. . . it was my opinion that Freddy is smarter and David could be led by Freddy into doing whatever they wanted to do.

Q Okay. Is it fair to say in 1983 that because Freddy was smarter, had a stronger personality, that Freddy dominated David?

A I would say so, yes, sir.

(PC 473-74).

Mr. Gore's sister would have testified similarly from her own observations of and experiences with the two men:

> . . . David and Frederick Waterfield were very close when they were growing up. Freddy was David's idol. Freddy was very domineering. I could tell from the times I played with the two of them that Freddy was able to get David to do exactly what Freddy wanted him to do.

When I was in ninth grade, Freddy sexually assaulted me. I had just left my bedroom and was walking towards the family room, when Freddy grabbed me from behind and pulled me into my bedroom. David was with him. David held me down while Freddy took off my pants and penetrated my vagina with his fingers. As this was going on, I was screaming for them to stop and threatening to tell on them. Freddy was instigating and directing the entire incident. I had the feeling this was not the first time Freddy had done something like this, and now he was teaching David how to do it too. After Freddy had penetrated my vagina with his fingers, David said "No, that's my sister," and pulled him away from me. . .

(Affidavit of Wendy Bowling, PC 923-24).

Mrs. Bowling's husband could also have testified:

. . . People did not think very much of David, and he realized this. The people who meant most to David were constantly belittling him, including his parents. Donna, David's wife was constantly putting him down and making him feel lousy. Even though David wasn't somebody I looked up to or wanted to be like, I always felt bad when people would mistreat him. It's just not right to be mean to people who are slow and different. David really didn't have friends. People would rather make fun of him than be friendly to him. David ended up spending a lot of time with his cousin, Frederick Waterfield, for this reason.

I've always thought of Freddy Waterfield as the kind of person who would land you in some trouble pretty quick, but David worshipped Freddy. The two of them were always together. David would follow Freddy anywhere and do anything that Freddy wanted him to.

The power that Freddy had over David really became apparent to me when I saw the way the two of them interacted during fishing trips. There was nothing that David loved as much as fishing, but he would often quit fishing and eagerly go off with Freddy just because Freddy wanted him to.

Freddy gave David a sense of importance. While most people did not think much of David, Freddy was a member of the football team, did well academically and was popular. It gave David a real sense of pride that someone like Freddy would pay that much attention to him.

It doesn't take much to influence David. He's a lot like Wendy in that way. They're both easily led.

> David isn't capable of doing alot of thinking on his own and he doesn't really think about what the consequences of his actions are going to be.

(Affidavit of William Bowling, PC 929-30). Mr. Bowling testified at the post-conviction hearing in the state court, as he would have testified at the sentencing phase of Mr. Gore's trial:

> Q Now, did David have a lot of friends when he was in school?
>
> A I don't know of any but the one, his cousin Freddy Waterfield.
>
> Q Did he have any friends after -- well, did David finish school?
>
> A No, as I understand he quit and then went back and got his GED at his mother's request.
>
> Q Did David have any friends that you know of when he had quit school other than Freddy?
>
> A No. Every time I ever saw him he was either sitting around with Freddy or riding around with him in his truck or working with him down at that 4 x 4 shop that they had together.
>
> Q Could you tell me what Freddy Waterfield was like in school, what his personality was like?
>
> A I was about two years behind him or a year behind him, something along that time. I'm not sure of his age. But from what I could tell of him he was some kind of a football star, many people looked up to him for his athletic abilities and his open, outgoing personality. I didn't get to know him much. I felt I was being put down when I was around them so I didn't try to get to know him. I thought me being younger they didn't want to be around me. But he seemed like he was a very outgoing person.
>
> Many of the people seemed to like him. Many of the ladies that I had known from the school said they knew him and thought he was a very easy going guy.
>
> Q So he was kind of a ladies man, at least?
>
> Q I would think so.
>
> Q Kind of a bid man on campus?

A Yes.

Q Was David like that? Was David popular in school?

A No, in fact, since all this has happened most of the people I spoke to can't remember him. They went to school with him but can't remember him. They looked in their yearbooks and they still can't remember. They can't remember him, not until they seen him on TV.

Q Why do you think that was?

A Keeping to himself, not getting to know people, he just went to school, did what he had to do and that was it. Very quiet. Not really wanting to make any extra friends, I would believe.

Q What do you think David got out of being Freddy's companion? Why do you think David hung around Freddy?

A I believe that maybe in his case he would feel a little more, how should I say, it's like if you hang around with somebody that somebody looks up to that maybe they will think a little more of you. Maybe they will start associating with you, thinking you're real nice, too, and maybe make a lot more friends that way. That's what I would feel it would be more like in his case. That by being around him maybe more people would like him. Maybe some of it would rub off, the friends and getting to know other people.

Q So to try and make up maybe for some of David's deficits, personality deficits?

A Yes.

(Testimony of William Bowling, PC 393-95).

A Yes, him and Freddy were real close. If you ever saw one, the other one would most of the time be with them. Even when they came to the hunting camp, a lot of times I would see him and Freddy coming together. Even though we were having a family get together they would get in, come in Freddy's truck, and if the fish weren't biting Freddy was ready to do something and say, "David let's go do something else," and he would put the pole away. And that's not like David. He likes fishing. Normally, he likes to fish until the fish are gone. He would fish all day if he can.

Q Did that strike you as strange, the influence

that Freddy seemed to have on David?

A Yes, I know how much he likes to go down to that hunting camp to go fishing and hunting and suddenly Freddy saying, Let's go, he was ready to go. It seems to me, he found something he enjoys doing or getting away rather than doing this, his favorite past time, I believed.

Q The occasions you saw David and Freddy together, did Freddy always have that kind of dominating influence over David?

A Yes, it seemed like when they were together that David would more or less be like tagging along or a shadow for him. It seemed like he really thought a lot of Freddy like many people did I guess. But it seemed like he was his idol or something. He wanted to be like Freddy; maybe he thought by hanging around him he would be more like him and people would like him better.

Q That started in high school?

A Yes, I think so. They grew up together from very young ages, being cousins of course, and they were around each other a lot.

Q That continued on until 1983?

A Yes.

Q Shortly up until this offense was committed?

A Yeah, they were still working together and hanging around together, of course, taking off together in vehicles, going out on the town and such together.

Q After they finished working the day together then David would go out with Freddy at night as well?

A Yes, usually they would find something to do together in the evenings.

Q Would you say that David was hanging out pretty much exclusively with Freddy during this period of time?

A I believe Freddy was about the only close friend that he could do anything with. He might have acquaintances other than Freddy but Freddy seemed to be the only one that he wanted to be with, to do anything with.

(PC 405-07).

Mr. Gore's uncle would also have testified regarding the relationship between his nephew and Freddy Waterfield:

> Q Could you tell us how Freddy Waterfield struck you during that time, what kind of person he was?
>
> A Well, I wish I could say it.
>
> Q You can go ahead and say it.
>
> A One of the biggest liars that ever walked the face of the earth.
>
> . . . .
>
> Q Can you tell us what kind of a person Freddy was? Can you explain to the Judge what you thought of Freddy based on these meetings?
>
> Q You're putting this hard on me.
>
> Q Excuse me.
>
> A Honest opinion, I wouldn't trust him as far as I could see him. When he was at my place, Mr. Vocelle, I'd have to watch him. Because he had his mouth engaged before he had his brain engaged or vice versa, I don't know. But like he asked, no, I wouldn't trust him at all and he led David around like a -- from every time I seen them, he was leading David around like a little puppy dog, you know.
>
> Q Okay, Mr. Gore. Was Freddy outgoing?
>
> A Very, yes.
>
> Q Was he talkative?
>
> A You couldn't get a word in edgewise.
>
> Q Did Freddy have a personality, a forceful personality, someone that would go out and talk to people, strike up conversations actually?
>
> A He would have made a Philadelphia lawyer.
>
> Q Okay.
>
> A If he --

Q Go ahead, you were going to say something?

A If he would have had the chance, if he would have had the education, college, he would have made one of the greatest Philadelphia lawyers, Matlock wouldn't have stood a Chinaman's chance with him, I guarantee you that.

Q I take it then that Freddy was brighter than David was?

A He was smart.

Q Smarter than David?

A Oh, by all means, yes, he was, like I say, he was very intelligent.

Q And not as, more than intelligent than David; is that right?

A Rephrase that, I didn't hear you.

Q Freddy was smarter than David was?

A Yes, sir.

Q That was one of the reasons that Freddy could lead David around; is that right?

A Yes. Yes.

(Testimony of Joseph Gore, PC 363-65).

3. The Parties' Positions Below

Before the District Court and then in the Court of Appeals the State did not dispute that all of this evidence was mitigating in its nature. Neither did the State contest the veracity of the evidence. The District Court, and subsequently the Court of Appeals in its affirmance, found that the evidence was reliable, credible, and that it established mitigating factors. The Court of Appeals ruled that "under the circumstances of this particular trial," the exclusion of such mitigating evidence from the jury's consideration could not be

deemed harmless. Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991).

C. This Court's Standard of Review and Its Application in the Eleventh Circuit

In light of the substantial nature of the mitigation in this case, Mr. Gore submitted to the District Court and Court of Appeals that it could not be "confidently conclud[ed]" that the error was harmless beyond a reasonable doubt. See Skipper v. South Carolina, 476 U.S. 1, 8 (1976). The eighth amendment requires that capital sentencing proceedings be individualized and reliable and thus that capital sentences "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604 (emphasis in original). This requirement is necessary in order to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 605. This Court has cautioned that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer," Satterwhite v. Texas, 486 U.S. 249, 108 S. Ct. 1792, 1798 (1988), and thus that review of errors in such proceedings requires the strict application of the standard that the State must prove harmlessness beyond a reasonable doubt. Satterwhite; Chapman v. California, 386 U.S. 18 (1967).

The Eleventh Circuit Court of Appeals has consistently applied the Chapman standard to the review of cases involving

Hitchcock error, and this Court has never indicated that the Court of Appeals has been acting improperly in applying this Court's harmless error standard. Most recently this Court denied certiorari review in Singletary v. Jackson 111 S.Ct. ___ (1991), previous history, 931 F.2d 712 (11th Cir. 1991), and Singletary v. Booker, 111 S.Ct. ___ (1991), previous history, Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991), each involving the State's requests for certiorari review in cases where the Court of Appeals ruled that the errors resulting from the exclusion of mitigating evidence could not be deemed harmless beyond a reasonable doubt under Chapman.

The Eleventh Circuit has also found Hitchcock errors to be harmless. See Tafero v. Dugger, 873 F.2d 249, 252 (11th Cir. 1989), cert. denied, 110 S.Ct. 1834 (1990); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, 110 S.Ct. 1834 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), cert. denied, 485 U.S. 982 (1988). It is in cases like this one, where review of the totality of the circumstances of the particular case, Gore, 933 F.2d at 905, discloses that the error had an effect on the verdict, that the Court of Appeals has found that the State has not established harmlessness beyond a reasonable doubt. See Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) ("The presence of substantial nonstatutory mitigating evidence in this case ... is sufficient to render the Hitchcock error not harmless beyond a reasonable doubt"), cert. denied, 110 S.Ct. 2628 (1990). See also Booker, 922 F.2d 633 (11th Cir. 1991), cert. denied, 111 S.Ct. ___ (1991); Jackson, 931 F.2d 712 (11th Cir. 1991), cert.

denied 111 S.Ct. ___ (1991).

This Court has not previously reversed the Eleventh Circuit Court of Appeals' application of the Skipper/Satterwhite/Chapman standard in either category of cases. See Jackson, 111 S.Ct. ___ (denying certiorari); Booker, 111 S.Ct. ___ (denying certiorari); Delap, 110 S.Ct. 2628 (denying certiorari); Tafero, 110 S.Ct. 1834 (denying certiorari); Clark, 485 U.S. 982 (denying certiorari). The mitigating evidence in Mr. Gore's case is reliable, credible, and valid; it would have been significant to the jury's determination as to the appropriate penalty; it would have affected the decision of a reasonable jury; but the jury here was not allowed to hear it.

ARGUMENT

THIS CASE PRESENTS NO CONTROVERSY WARRANTING THE GRANTING OF THE STATE'S PETITION

The Petitioner agrees (petition, p. 4) that the state trial court, on the basis of an objection by the trial prosecutor, did not allow defense counsel to present to the jury the mitigating evidence which he had developed on Mr. Gore's behalf. Mr. Gore presented an issue relating to the trial court's ruling on direct appeal to the Florida Supreme Court, but the Court sustained the conviction and death sentence without addressing the trial court's error. See Gore v. State, 475 So.2d 1205 (Fla. 1985).[2]

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[2] The Petitioner agrees that the issue was presented on direct appeal (petition, p. 4) although stating that the claim was based on "Florida law." Mr. Gore notes that the claim raised on direct appeal was not limited to a state law challenge to the trial court's error, as the state supreme court's subsequent opinion during post-conviction proceedings indicates. See Gore v. Dugger, 532 So.2d 1048 (Fla. 1988).

After the issuance of Hitchcock v. Dugger by this Court in 1987, and given the Florida Supreme Court's holdings that claims relating to the exclusion of mitigating evidence from consideration in capital sentencing proceedings are cognizable in post-conviction proceedings in the Florida courts, see, e.g., Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989) (listing a number of these holdings), Mr. Gore requested that the state courts address the errors relating to the trial court's ruling in his motion for post-conviction relief filed pursuant to Fla. R. Crim. P. 3.850 and state court petition for writ of habeas corpus. The Florida Supreme Court issued a consolidated opinion on the two actions. Gore v. Dugger, 532 So.2d 1048 (Fla. 1988). As the opinion demonstrates, the state supreme court recognized that "Gore should have been permitted to introduce such evidence," id. at 1050, but improperly analyzed the claim. Viewing the claim as one involving "ineffective assistance of counsel," the Court denied relief by holding that it did not believe that but for the error the result of the proceedings would have been different. Id. Proper review of the constitutional error, however, required the Florida Supreme Court to place on the State -- the beneficiary of the error -- the burden of demonstrating harmlessness beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967); Satterwhite v. Texas, 486 U.S. 249 (1988); Skipper v. South Carolina, 476 U.S. 1 (1986). The Florida Supreme Court did not apply the standard of harmlessness beyond a reasonable doubt to this case. As the opinions of the District Court and Court of Appeals would subsequently

demonstrate, the state court's failure to apply the proper standard of review resulted in an erroneous disposition.

Mr. Gore's petition for writ of habeas corpus was heard by the Chief District Judge for the Middle District of Florida, William Terrell Hodges. Chief Judge Hodges' ruling is reported as Gore v. Dugger, 763 F.Supp. 1110 (M.D.Fla. 1989). Before the District Court, the Attorney General agreed that the state trial court's rulings excluding relevant mitigating evidence from the jury's consideration were erroneous and that Lockett and Hitchcock were violated. The State Attorney General did not argue that the proffered mitigating evidence was not credible, nor that it was unreliable, nor that it lacked mitigating value. Chief Judge Hodges considered the facts of this case and the value of the mitigation and, after analyzing precedent from this Court and the Eleventh Circuit Court of Appeals, granted habeas corpus relief as to the death sentence finding that the error could not be found to be harmless beyond a reasonable doubt.

Chief Judge Hodges, Respondent notes, was the District Court Judge in Clark v. Dugger, 834 F.2d 1501 (11th Cir. 1987), a case in which Hitchcock error was found harmless beyond a reasonable doubt. In the instant case, as well as in previous cases in which the Florida Attorney General has sought from this Court a reversal of rulings by the Eleventh Circuit which found Hitchcock errors not to be harmless beyond a reasonable doubt,[3] the Attorney General has relied on Clark in support of its arguments.

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[3] See Singletary v. Booker, 111 S.Ct. ___ (1991); Singletary v. Jackson, 111 S.Ct. ___ (1991).

The fact that the same Chief District Judge rendered the rulings in Clark (finding the error harmless) and Gore (finding that the error was not harmless) speaks volumes to the propriety of the District Court's ruling in this case -- a ruling rendered by a Chief Judge experienced in addressing claims of Hitchcock error in Florida cases and in enforcing a standard of review which denies relief to those petitioners in whose cases the error can be deemed harmless beyond a reasonable doubt.

The State Attorney General appealed Chief Judge Hodges' ruling to the Eleventh Circuit Court of Appeals. The Court of Appeals' panel was comprised on Chief Judge Tjoflat, Judge Fay, and Judge Johnson. The opinion affirming Chief Judge Hodges' ruling was unanimous. Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). The full court thereafter denied the State's petition for in banc rehearing with no member of the Court suggesting that the panel's decision should be reconsidered. Gore v. Dugger, No. 89-4026 (11th Cir. July 23, 1991) (Order denying petition for rehearing in banc).

Each Judge on the Gore panel has extensive experience in reviewing claims of Hitchcock error in Florida cases, having rendered rulings in such cases on a number of occasions. Judge Fay was the author of the lead opinion in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), a case in which the Hitchcock error was found harmless beyond a reasonable doubt. Demps, like Clark, is a case on which the Florida Attorney General has often relied to argue that this Court should grant certiorari and reverse the Eleventh Circuit's ruling in cases where a Hitchcock error is

found not to be harmless beyond a reasonable doubt. See, e.g., Singletary v. Jackson, 111 S.Ct. ___ (1991) (Attorney General's petition for writ of certiorari). The standard which Judge Fay specified as the appropriate one was stated as follows:

> To be harmless in the Hitchcock context, the court must determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence.

Demps, 874 F.2d at 1390. Nothing in the Court of Appeals' opinion in Gore suggests that this standard was ignored, overlooked, or not applied when the Court reviewed Chief Judge Hodges' ruling. See Gore, 933 F.2d at 905 ("This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the Lockett/Hitchcock principle cannot be found to be harmless.")

Judge Fay's ruling that the error was harmless in Demps was also based on "the circumstances of [the] particular trial" at issue.[4] Judge Fay found that the error was harmless in Demps because:

> a. As to mitigation relating to the petitioner's history of drug addiction: "[W]hile the evidence of a history of drug addiction can be mitigating evidence, we believe that the circumstances in this case indicate beyond a reasonable doubt that this evidence would not have influenced the jury to mitigate Demps' sentence."

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[4] As discussed subsequently in this response, contrary to the Attorney General's suggestions, nothing in the Gore opinion suggests that the Court did not consider the specific circumstances of Mr. Gore's case, including the value of the excluded mitigation and the aggravating factors. Indeed, the Court of Appeals expressly indicated that its ruling was based on "the circumstances of this particular trial." Gore, 933 F.2d at 905.

Demps, 874 F.2d at 1390 (emphasis supplied).

b. As to the mitigation relating to the petitioner's military record: "[W]e are persuaded that the evidence would not have influenced the jury to recommend life." Id.

c. As to the petitioner's record while in prison prior to the offense: "Like his history of drug abuse, this evidence can be classified as mitigating. See, e.g., Skipper, 476 U.S. 1 [1986] ... [But] Demps' record would not have affected the mind of a juror in any way where the murder for which the jury recommended death occurred in the prison." Demps, 874 F.2d at 1390 (emphasis in original).

d. As to alleged disparate treatment of codefendants: "... Demps' prior criminal record was sufficient to justify imposing a more serious penalty." Id. at 1391.

Judge Fay was one of the panel members involved in the unanimous ruling in Gore. Judge Fay's agreement, and a comparison of the opinions in Demps and Gore, demonstrate that the panel was keenly aware that in considering whether the Hitchcock error was harmless it was to review the totality of the circumstances of "this particular trial." Indeed, in Gore, the Court expressly said that this is what it did. See Gore, 933 F.2d at 905.

Chief Judge Tjoflat, like Judge Fay, also has not hesitated to rule that a Hitchcock error is harmless when the facts of the "particular trial" suggest that conclusion. Chief Judge Tjoflat was, in fact, a member of the panel in Clark (which, as discussed above, found the Hitchcock error there at issue harmless beyond a reasonable doubt). In Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), applying a standard akin to the one discussed by Judge Fay in Demps, Chief Judge Tjoflat wrote:

> We recognize that Lockett error can be harmless. See Hitchcock, 481 U.S. at 398, 107 S.Ct. at 1824. If the

> state can prove beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation, the error is harmless and the recommendation may stand. See Chapman v. California, 386 U.S. 18, 24 [1967]. For example, if the defense produces no nonstatutory mitigating evidence, the judge's failure to instruct the jury that its consideration is not limited to the seven statutory mitigating circumstances would constitute harmless error and no reason to require resentencing would exist. Similarly, resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant that it would not have altered the jury's decision.

Jones, 867 F.2d at 1279-80 (emphasis supplied). Jones was cited by the unanimous panel in Gore, 944 F.2d at 905.

Judge Johnson was a member of the unanimous panel joining Chief Judge Tjoflat's opinion in Jones and was also an member of the unanimous panel in Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991), a case in which the Court of Appeals noted that because the excluded mitigation would have been "significant" to the jury's decision the error could not be said to be harmless beyond a reasonable doubt. This Court recently denied the Attorney General's petition for writ of certiorari in Jackson, see Singletary v. Jackson, 111 S.Ct. ___ (1991), a petition which presented a request for certiorari review based on arguments akin to those now presented in Mr. Gore's case.

A review of the Eleventh Circuit's opinions in cases involving Hitchcock error -- indeed, of the opinions of the same Judges who sat on the panel in Mr. Gore's case -- thus demonstrates that the Court of Appeals has consistently followed this Court's precedents regarding the appropriate standard of constitutional harmless error review.

First, the standard applied is the Chapman v. California,

386 U.S. 18 (1967), standard. See Jones, 867 F.2d at 1279, citing and relying on Chapman v. California (finding the error not harmless beyond a reasonable doubt); Demps, 874 F.2d at 1389, citing and relying on Chapman v. California (finding the error harmless beyond a reasonable doubt); Clark, 834 F.2d at 1570, citing and relying on Chapman v. California (finding the error harmless beyond a reasonable doubt); see also Gore, 933 F.2d at 905 (citing to page 1279 of Jones). The Court of Appeals has also consistently heeded this Court's opinions in cases such as Satterwhite v. Texas, 486 U.S. 249 (1989), and Skipper v. South Carolina, 476 U.S. 1 (1986), addressing the application of the Chapman standard to constitutional errors at the sentencing phase of a capital trial. See Jackson, 931 F.2d at 716, citing and relying on Skipper v. South Carolina; Jones, 867 F.2d at 1279-80, citing and relying on Skipper v. South Carolina; see also Gore, 933 F.2d at 905, citing and relying on page 1279 of Jones. The State's suggestion (petition at pp. 15-16) that the Eleventh Circuit Court of Appeals' opinions overlook Chapman is inconsistent with the Court of Appeals' precedents.

Second, contrary to the suggestions in the State's petition (pp. 10-11, 14), in considering harmless error questions the opinions of the Court of Appeals -- and, again, the opinions of the very Judges who presided in Mr. Gore's case -- have looked to the totality of "the circumstances of [the] particular trial." Gore, 933 F.2d at 905. The panel unanimously said that that is what it had done in Gore itself. See also Demps; Jones; Jackson; Clark (each analyzing the totality of the circumstances). Such

an analysis includes consideration of the aggravation and the nature (i.e., the quality) of the mitigation excluded from the jury's consideration. Cf. Petition for Writ of Certiorari, pp. 10-11 and 14 (arguing that the Court of Appeals' precedents do not consider the quality of the mitigation). Thus, in Jackson, because there existed "significant" mitigating evidence which would have affected a reasonable juror, the error was found not to be harmless beyond a reasonable doubt. The Court of Appeals applied a similar analysis in Jones and in Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991).[5]

On the other hand, as Judge Fay's opinion in Demps indicates, even where the excluded evidence is mitigating in nature the Court of Appeals will find the error harmless beyond a reasonable doubt under Chapman when the totality of "the circumstances in [the particular] case indicate beyond a reasonable doubt that [the excluded] evidence would not have influenced the jury to mitigate [the petitioner's] sentence." Demps, 874 F.2d at 1390. The errors were found harmless by the Court of Appeals in Demps, Clark, and Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989), under the Chapman standard; they were found not harmless beyond a reasonable doubt in Jones, Jackson, and

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[5] This Court recently denied petitions for writs of certiorari filed by the Florida Attorney General in Jackson, Singletary v. Jackson, 111 S.Ct. ___ (1991), and Booker, Singletary v. Booker, 111 S.Ct. ___ (1991). These petitions presented the same arguments as those now asserted in Mr. Gore's case.

Gore under that same standard.[6]

Contrary to the State's suggestion, in each category of cases the Court of Appeals' precedents demonstrate that the Court has consistently applied the Chapman standard to the totality of the circumstances of the particular case at issue. And the Court reviewed the circumstances of "this particular trial" in Mr. Gore's case. See Gore, 933 F.2d at 905.

In Mr. Gore's case, the veracity and mitigating nature of the excluded evidence was not questioned by the State before the District Court or Court of Appeals, and the State has not questioned the veracity and mitigating nature of the evidence before this Court. The District Court found the evidence to be reliable, credible, and mitigating in its nature. The Court of Appeals affirmed each of these aspects of the District Court's ruling. After noting that harmless error analysis is applicable to cases involving Hitchcock/Lockett error, the Court of Appeals wrote, "This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the Lockett/Hitchcock principle cannot be found tc be harmless." Gore, 933 F.2d at 905. Given its precedents, see, e.g., Jones, 867 F.2d at 1279 (cited by the panel in Gore), the Court could not have so ruled if the mitigating evidence at issue was "insignificant" to the jury's consideration "under the circumstances of this particular trial."

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[6] This Court has denied certiorari petitions in each category of cases. See, e.g., Clark, 485 U.S. 982 (1988); Tafero, 110 S.Ct. 1834 (1990); Demps, 110 S.Ct. 1834 (1990).

The precedents of the Court of Appeals, particularly those of the Judges who presided in Mr. Gore's case,[7] the Court's consistent application of the Chapman standard, and "the circumstances of [Mr. Gore's] particular trial" all demonstrate that no true question, issue, or ground warranting certiorari review or a reversal of the Court of Appeals' ruling is involved in the Attorney General's petition in this case. The Respondent does acknowledge -- as the panel indicated -- that there exists "some disagreement" in the Court of Appeals as to whether it is proper for the reviewing court to grant relief when the excluded evidence cannot be deemed to involve "significant" mitigation. See, e.g., Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989). Judge Fay and Chief Judge Tjoflat (two of the three Judges on Mr. Gore's panel), however, are the two Eleventh Circuit Judges who have taken the most restrictive view, consistently espousing the principle that where the evidence cannot be deemed to involve "significant" mitigation or where the totality of the circumstances indicate that the error had no effect on the jury, the error should be deemed harmless. See Demps; Clark; Jones.

What "disagreement" there may exist in the Court of Appeals was and remains irrelevant to the disposition of Mr. Gore's case. The unanimous ruling of Chief Judge Tjoflat, Judge Fay, and Judge Johnson "that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence" in

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[7] Judges who have found Hitchcock errors harmless when the totality of the circumstances have so suggested.

violation of Lockett and Hitchcock cannot be deemed harmless beyond a reasonable doubt presents absolutely no controversy warranting this Court's review.

When stripped of its hyperbole, reviewed in the light of the Court of Appeals' actual precedents, and considered in the context of the circumstances of this case, Respondent respectfully submits that the State's petition for writ of certiorari here, like the one recently denied in Singletary v. Jackson, 111 S.Ct. ___ (1991), involves little more than the Attorney General's disagreement with the Court of Appeals' ultimate disposition. That disagreement surely does not warrant a grant of certiorari review.

In sum, there is no controversy -- no "hopeless conflict" (see petition, p. 16) -- relevant to the disposition of this case, a case in which the District Court and Court of Appeals found that the state trial court's refusal to allow the jury to consider relevant, credible, reliable, and significant evidence of a mitigating nature was not harmless beyond a reasonable doubt. The Court of Appeals' panel included the two Eleventh Circuit Judges who have espoused the most restrictive view in the area -- i.e., that Hitchcock/Lockett error can and should be found "harmless" where the omitted mitigating evidence lacks significance or where the totality of the circumstances of the "particular trial" at issue demonstrate that the error resulting from the exclusion of the mitigating evidence is harmless.

By no means can it be fairly said that the panel in Mr. Gore's case took the position that "any attempt to 'wrestle' with

the [harmless error] issue would only result in further conflict" (petition, pp. i and 7); rather, the panel "unanimously agree[d]" that under any harmless error formulation the error involved in "this particular trial" was not harmless beyond a reasonable doubt. Compare Gore, 933 F.2d at 905, with Delap, 890 F.2d at 306 n.23 (applying a similar analysis), cert. denied 110 S.Ct. 2628 (1990). There is no reason to disturb the Court of Appeals' ruling in this case. There is no true controversy warranting the granting of the State's current petition for writ of certiorari.

CONCLUSION

Neither a substantial nor a debatable question is involved in the State's petition, nor does the petition present a controversy warranting certiorari review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301 on this 19th day of December, 1991.

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Attorney